TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM [redacted] 1934

No. ~~876~~ 4

CLAIRE A. WARNER, ADMINISTRATRIX OF THE ESTATE OF JOHN M. WARNER, DECEASED, PETITIONER,

vs.

EDWARD F. GOLTRA, DOING BUSINESS UNDER THE STYLE AND NAME OF THE GOLTRA BARGE LINE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED MARCH 16, 1934

CERTIORARI GRANTED APRIL 9, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

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IN CIRCUIT COURT OF CITY OF ST. LOUIS

114509-B

CLAIRE A. WARNER, Administratrix of the Estate of John M. Warner, Deceased,

vs.

EDWARD F. GOLTRA, Doing Business under the Style and Name of The Goltra Barge Line

JUDGMENT—Feb. 2, 1929

It is ordered that this cause be assigned to Division No. 1.

Now at this day this cause coming on for hearing, come the parties hereto by their respective attorneys, and upon motion, it appearing to the satisfaction of the Court that the defendant's demurrer to the second amended petition has been sustained, and plaintiff declining to plead further, it is ordered and adjudged by the Court that plaintiff's cause of action be and the same is hereby dismissed, that plaintiff take nothing by her petition herein, and defendant recover of plaintiff her costs and other charges herein expended, and have therefor execution.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

ORDER ALLOWING APPEAL—Feb. 2, 1929

Now at this day comes the plaintiff by attorneys and upon motion and for good cause shown, the Court doth grant plaintiff ten days after the close of the December 1928 Term of this Court within which to file her appeal bond, conditioned according to law in the penal sum of $250.00, with surety to be approved by the Court, Judge or Clerk thereof in vacation.

[fol. 1c] Thereupon, plaintiff files and presents to the Court her affidavit for appeal and prays an appeal to the Supreme Court of Missouri, and the Court having seen and examined the same, doth order that an appeal be and is hereby allowed plaintiff to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered.

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 1] IN SUPREME COURT OF MISSOURI, DIVISION No. 2, OCTOBER TERM, 1930

No. 29,648

CLAIRE A. WARNER, Administratrix of the Estate of John M. Warner, Deceased, Appellant (Plaintiff),

vs.

EDWARD F. GOLTRA, Doing Business under the Style and Name of the Goltra Barge Line, Respondent (Defendant)

Appeal from the Circuit Court of the City of St. Louis, Mo., Honorable Claude O. Pearcy, Judge

Appellant's Abstract of the Record—Filed April 8, 1931

Claire A. Warner, administratrix of the estate of her husband, John M. Warner, deceased, instituted her suit against Edward F. Goltra, doing business under the style and name of the Goltra Barge Line, in the Circuit Court, City of St. Louis, Missouri, on the 15th day of March, 1927, [fol. 2] where it was numbered and known as cause No. 114,-509. Plaintiff's first amended petition was filed by leave of said Court on February 18, 1928. Plaintiff's second amended petition was filed by leave of said Court on May 28, 1928, and is as follows, to wit (caption and signature being omitted):

PLAINTIFF'S SECOND AMENDED PETITION

Comes now the plaintiff in the above-styled cause of action, and leave of Court having been first had and obtained, files this, her second amended petition, and states that she

is and at all times hereinafter mentioned was a resident of the City of Memphis, State of Tennessee; that plaintiff was duly appointed administratrix C. T. A. of the estate of her late husband, John M. Warner, deceased, by the Probate Court of Shelby County, Tennessee, on May 26th, 1926, and has duly qualified as such administratrix and is now acting in that capacity. Plaintiff further states that she was married to the late John M. Warner on or about the 18th day of July, 1917, and that they thereafter lived together as husband and wife until the wrongful death of said John M. Warner, deceased, on May 11, 1926; that the plaintiff is suing as the personal representative of her late husband, the aforesaid John M. Warner, in behalf of herself, as his widow, and Claire Warner, their daughter and only child of said union.

Plaintiff further states that on or about May 11th, 1926, the defendant was and now is a resident and citizen of the City of St. Louis, State of Missouri, had then and now has his office and principal place of business in said city and state, and that on or about the said 11th day of May, [fol. 3] 1926, and at all times hereinafter mentioned, the defendant was doing business under the style and name of the "Goltra Barge Line" and was a common carrier engaged in carrying freight in interstate commerce on the Ohio and Mississippi Rivers, and that on that date the defendant, as such common carrier, operated, managed, maintained and navigated in such interstate commerce on said rivers a certain vessel named "Iowa".

Plaintiff further states that for some time prior to said May 11th, 1926, and on that date and at all times hereinafter mentioned the said John M. Warner, deceased, was employed and engaged by the said defendant to serve and was serving on board the said vessel "Iowa" as a seaman and in the capacity of captain or master, and that it was his duty acting in the course of his employment as an employe of the said defendant and as the result of specific orders of the defendant to be on board the said vessel "Iowa" and to do all things which are required by custom and law of the duly licensed captain or master of the "Iowa."

Plaintiff further states that the presence of said John M. Warner on board the said "Iowa" on said May 11th, 1926, in the capacity of captain or master, was required by Sec-

tion 222, Title 46, of Mason's U. S. Code Annotated 1926, which, in part, provides as follows:

"No vessel of the United States subject to the provision of this chapter or chapters 14 and 15 or to the Inspection Laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew including certificated life-boat [fol. 4] men, separately stated, as may in the judgment of the local inspectors, who inspect the vessel, be necessary for her safe navigation."

And by the rules and regulations of the Steamboat Inspection Service of the Department of Commerce, which rules and regulations are by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926, given the force and effect of laws.

Plaintiff further states, however, that on said May 11th, 1926, the said John M. Warner, although he had a license to act as captain or master on both the Ohio and Mississippi Rivers, did not have power or authority or a license to act as a pilot for the said "Iowa" while it was being navigated, managed and operated on the Ohio River as aforesaid, and that this fact was well known to the said defendant.

Plaintiff further states that said defendant was required by said Section 222 of Title 46 of Mason's U. S. Code Annotated 1926, and by the rules and regulations of the Steamboat Inspection Service of the Department of Commerce, to employ a duly licensed pilot to operate, navigate, manage and control the said "Iowa" while it was on the Ohio River on said May 11th, 1926, and that defendant had complied with this section of the statute and these rules and regulations.

Plaintiff further states that although said John M. Warner was on board the said "Iowa" as aforesaid, and was acting in the course of his employment and scope of his duties as captain or master on said date, as aforesaid, he was not acting as pilot and could not so act under Section 224, Title 46, of Mason's U. S. Code Annotated 1926, which [fol. 5] forbids any person to serve as a pilot of any steamer who is not licensed by the Steamboat Inspection Service of the Department of Commerce, and by the rules and regulations of said service; and he was not in charge of

the actual operation, navigation and management of the said "Iowa" on said date, but that these duties were then being performed by the pilot who was employed and engaged by said defendant to serve on board the said "Iowa," but who was not under the direction or control of said John M. Warner and could not be in view of Section 28 of Rule 5 of the General Rules and Regulations prescribed by the Steamboat Inspection Service of the Department of Commerce, which rule had the force and effect of law as aforesaid, and which provided as follows:

"Pilots of steam vessels, while in the discharge of their duties, shall be governed by the rules of the board of supervising inspectors, made for their guidance, and not by any instructions emanating from any inspector or other person";

and by the other servants, agents and employes of the said defendant and who were then on board the said "Iowa."

Plaintiff further states that on said May 11th, 1926, and at the exact moment of the hereinafter mentioned collisions, while said John M. Warner was employed by said defendant and was serving on board the said "Iowa" as captain or master in the course of his employment for the defendant, as aforesaid, and while he was engaged in interstate commerce, and while the said "Iowa," operated, managed and controlled and navigated, as aforesaid, was actually being used in interstate commerce, the defendant, by and through his agents, servants and em-[fol. 6] ployes, was using the said vessel "Iowa" to tow or push several barges of freight from points in the State of Pennsylvania to points on the Mississippi River in the State of Louisiana; that at this time the water in the said Ohio River was dangerously low, but that, in accordance with the express instructions of the defendant, the agents, servants and employes of the said defendant were ordered by him to continue the said voyage; that when the said "Iowa" operated, as aforesaid, and the barges towed or pushed by it reached a point on said Ohio River near the Town of Stevensport, Kentucky, some of the barges became grounded due to the lowness of the water; that while said "Iowa" was being navigated, used and controlled by the agents, servants and employes of the said defendant,

other than said John M. Warner, to unground the said barges so that the said voyage might continue, the said agents, servants and employes of the defendant, other than the said John M. Warner, and independently of him and while said John M. Warner was not cognizant of exactly what was being done on all parts of the said "Iowa" so negligently, carelessly, recklessly and unskillfully handled, used, controlled, operated and navigated the said "Iowa" that they caused the said "Iowa" to collide forcibly and violently with the said barges and the bank of the Ohio River; that at this time the said John M. Warner was attempting to save his own life and the lives of those on board the said "Iowa" and was attempting to save the property of the defendant from further injury; that as a direct and proximate result of said collision and the violent jar resulting therefrom and caused thereby, caused as aforesaid by the negligence of the defendant, his agents, [fol. 7] servants and employes other than the said John M. Warner, the said John M. Warner was thrown from said "Iowa" into the waters of the said river and was thus caused to drown.

The plaintiff states that the death of said John M. Warner was directly and proximately caused by the negligence and unskillfulness of the defendant, his agents, servants and employes as aforesaid.

Plaintiff further states that immediately prior to his death, and for many years prior thereto, the said John M. Warner was a strong, healthy man of temperate and industrious habits; that at the time of his death he was 35 years of age, was earning as an employe of the said defendant a salary which averaged approximately $375 a month, and was the sole support of plaintiff, his wife, then 29 years of age, and Claire Warner, his daughter and only child, then 8 years of age, who now survive him.

Plaintiff further states that at the time of the wrongful death of the said John M. Warner she and her daughter were wholly dependent upon and had a present pecuniary interest in the life of the said John M. Warner, deceased, and by his death have been deprived of and thereby suffered and will suffer in the future the pecuniary loss of the society, consortium, maintenance, support, assistance and contribution of deceased, and said child has been deprived of, suffered, and will in the future suffer, the pecuni-

ary loss of her father's care, advice, counsel, education, training and support.

Wherefore, plaintiff prays judgment against said defendant for the sum of fifty thousand dollars ($50,000) and for the costs of this suit.

[fol. 8] On July 31, 1928, the defendant filed his demurrer to plaintiff's second amended petition in words and figures as follows (caption and signature being omitted):

DEFENDANT'S DEMURRER

Comes now the above-named defendant and demurs to plaintiff's second amended petition herein filed, and for grounds for said demurrer says that said second amended petition fails to state facts sufficient to constitute a cause of action against defendant.

DEFENDANT'S DEMURRER SUSTAINED

On December 31, 1928, and during the December Term, 1928, of said Circuit Court, the said Circuit Court, by an order duly entered of record, sustained defendant's demurrer to plaintiff's second amended petition.

On February 2, 1929, and during said December Term, 1928, plaintiff presented and filed with said Circuit Court her term bill of exceptions which had been signed and approved by Judges Granville Hogan and Claude O. Pearcy and which reads in words and figures as follows (caption being omitted):

PLAINTIFF'S TERM BILL OF EXCEPTIONS

Be it remembered, that on the 15th day of March, 1927, at the April Term, 1927, of said court, plaintiff instituted this suit against the above-named defendant and filed herein her petition, which petition in words and figures is as follows:

(Clerk here copy said petition on file.)

[fol. 9] Be It Further Remembered, That on the 18th day of February, 1928, at the February Term, 1928, of said court plaintiff, by leave of Court, filed herein her first amended petition, which first amended petition in words and figures is as follows:

(Clerk here copy said first amended petition.)

Be It Further Remembered, That on May 28, 1928, at the April Term, 1928, of said court, plaintiff, by leave of

Court, filed herein her second amended petition, which second amended petition in words and figures is as follows:

(Clerk here copy said second amended petition on file.)

Be Is Further Remembered, That on July 31, 1928, at the June Term, 1928, of said court, the defendant filed herein his demurrer to the plaintiff's said second amended petition, which said demurrer in words and figures is as follows:

(Clerk here copy defendant's demurrer to plaintiff's second amended petition on file.)

And Be It Further Remembered, That thereafter, on December 31, 1928, in Division No. 1 of said court, it being one of the days of the regular December Term, 1928, of said court, said demurrer of the defendant to the aforesaid second amended petition of plaintiff, coming on to be heard by the Court, was by the Court considered and sustained; to which action, ruling and order of the Court in sustaining said demurrer the plaintiff, by her counsel, then and there and at the time duly excepted and saved her exception and still excepts.

[fol. 10] Now, therefore, that the above matters and things and the action of the Court in sustaining said demurrer to the plaintiff's said second amended petition may be made a part of the record in this cause the plaintiff presents to said Court this, her bill of exceptions, and prays that the Court sign, seal, allow, approve and order the same placed of record in this cause, which is accordingly done the 2nd day of February, 1929, one of the regular days of the regular December Term, 1928, of said court.

Granville Hogan, Judge Presiding in Division No. 1 of the Circuit Court of the City of St. Louis, Missouri, Before Whom Said Demurrer to Said Second Amended Petition of the Plaintiff Was Heard and Who Sustained the Same. (Seal.)

Claude O. Pearcy, Judge Presiding in Division No. 1 of the Circuit Court of the City of St. Louis, Missouri, on the Date of the Signing and the Filing of This Bill of Exceptions. (Seal.)

All objections to this bill of exceptions hereby waived on this 2nd day of February, 1929.

Jos. T. Davis, Attorney for the Defendant.

(For the sake of brevity plaintiff's second amended petition and defendant's demurrer thereto, which have been previously quoted in this abstract of record, are not recopied in this term bill of exceptions.)

[fol. 11] Subsequently on said 2nd day of February, 1929, and at the said December Term, 1928, said cause was assigned to Division No. 1 of said Circuit Court and plaintiff filed therein her election to stand upon said second amended petition, which in words and figures is as follows (caption and signature being omitted):

ELECTION OF PLAINTIFF TO STAND UPON HER SECOND AMENDED PETITION

Comes now the plaintiff in the above-entitled cause, by her attorneys, and states that, whereas this Honorable Court on the 31st day of December, 1928, sustained defendant's demurrer to plaintiff's second amended petition filed in the above-entitled cause, and,

Whereas, said plaintiff excepted to the ruling of said Court, and still does so except, and has filed herein her term bill of exceptions, this plaintiff does hereby refuse to plead further in said cause as she has been injured by the erroneous order and action of this Court.

JUDGMENT

Thereafter, on said date and at the same December Term, 1928, the said Circuit Court rendered judgment in this cause in favor of the defendant and against the plaintiff.

Thereafter, on said date and during the same December Term, 1928, the plaintiff duly filed her affidavit for appeal in words and figures as follows (caption being omitted):

[fol. 12] AFFIDAVIT OF APPEAL

Comes now Clifton Powell Fordyce, of lawful age, being duly sworn upon his oath, states that he is agent for the plaintiff in the above-entitled cause, and, as such, is authorized to make this affidavit for and in plaintiff's behalf, and says that the appeal prayed for in the above-entitled

cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

Clifton Powell Fordyce.

Subscribed and sworn to before me this 2nd day of February, A. D. 1928. Madeline G. Kelly, Notary Public. My commission expires June 24, 1932. (Seal.)

ORDER ALLOWING APPEAL

Whereupon, on said date and at said term, the said Circuit Court granted the plaintiff ten days after the close of said December Term, 1928, to file her appeal bond in the sum of $250.00, with a surety to be approved by said court; duly approved the plaintiff's affidavit of appeal; and duly granted plaintiff an appeal to the Supreme Court of Missouri.

Thereafter and on February 9, 1929, said Court granted the plaintiff ten days additional time in which to file said appeal bond. On said date, also, Messrs. Wilson, Gates and Armstrong, by leave of Court, duly entered their appearance as associate counsel for the plaintiff.

[fols. 13 & 14] Thereafter and on February 12, 1929, the plaintiff duly filed her said appeal bond, which was on that day approved by said Circuit Court of the City of St. Louis, Missouri.

Respectfully submitted, Fordyce, Holliday & White; Wilson, Gates & Armstrong, Attorneys for the Appellant.

[fol. 15] IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—May 9, 1933

Come now the said parties, by attorneys, and after arguments herein, submit this cause to the Court.

IN SUPREME COURT OF MISSOURI

CLAIRE A. WARNER, Administratrix of the Estate of John M. Warner, Deceased, Appellant,

vs.

EDWARD F. GOLTRA, Doing Business Under the Style and Name of The Goltra Barge Line, Respondent

Appeal from the Circuit Court of the City of St. Louis

JUDGMENT—Dec. 20, 1933

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant costs and charges herein expended and have therefor execution. (Opinion filed.)

[fol. 16] IN SUPREME COURT OF MISSOURI, DIVISION NUMBER TWO, SEPTEMBER TERM, 1933

No. 29648

CLAIRE A. WARNER, Administratrix of the Estate of John M. Warner, Deceased, Appellant (Plaintiff),

vs.

EDWARD F. GOLTRA, Doing Business under the Style and Name of the Goltra Barge Line, Respondent (Defendant)

OPINION—Filed Dec. 20, 1933

This is an action for damages for the wrongful death of John M. Warner. The appellant's second amended petition states that the appellant, who was the administratrix and widow of John M. Warner, deceased, brought this suit in her own behalf and in behalf of her infant daughter to recover $50,000.00 damages for the death of her husband against the respondent, Edward F. Goltra, doing business

under the style and name of the Goltra Barge Line. Warner was an employee of the respondent and acted as captain or master of the towboat Iowa at the time of his death on May 11, 1926. On that day the Iowa was proceeding in interstate commerce with several barges of freight down the Ohio River. Warner was on board the Iowa in the course of his employment and the scope of his duties and was engaged in interstate commerce but, as he had no license to act as a pilot on this river, the vessel was navigated by a duly licensed pilot. Appellant's petition alleges that due to the negligence of this pilot the barges towed or pushed by the Iowa became grounded. In attempting to unground them, so that the voyage might continue, the [fol. 17] pilot so negligently handled and navigated the Iowa that he caused it to collide forcibly with the barges and the bank of the river. As a result of the collision Warner was thrown from the Iowa into the river and was drowned. This action is brought under Section 33 of the Merchant Marine Act of June 5, 1920 (popularly known as the Jones Act), which gives seamen the same rights that railway employees have under the said Employers' Liability Act.

A general demurrer was filed to the appellant's second amended petition, which was sustained by the trial court. Thereafter judgment was entered in favor of the respondent. From this judgment the appellant has appealed to this court.

The appellant in her brief states that the sole issue for this court to decide may be stated as follows: "Did Congress intend to exclude the masters of vessels and their personal representatives from the remedial effects of Section 33 of the Jones Act?"

In other words the question is, does the word "seaman," as used in the Jones Amendment (June 5, 1920) to the Merchant Seamen, Chapter 18, making the "Federal Employers' Liability Act" applicable to seamen as it applies to employees of railroads, include the captain or master of a ship or vessel?

Section 33 of the Jones Act (which is Section 688 U. S. C. A., Title 46) is as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury,

and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be ap- [fol. 18] plicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, section 20, 38 Stat. 1185; June 5, 1920, c. 250, section 33, 41 Stat. 1007.)"

To determine whether or not the word "seaman" includes the word "master" it is necessary for us to determine what Congress had in mind when it enacted Section 713 of this Chapter. In this section Congress defined certain words that are used in this Chapter. It reads as follows:

"In the construction of this chapter, every person having command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

Appellant cites various occupations on board a vessel which the courts have held to be those of a seaman. For instance, an owner of an orchestra was held to be a seaman. The Sea Lark, 14 Fed. (2nd) 201. An engineer of a dredging barge was held to be a seaman. City of Los Angeles v. United Dredging Co., 14 Fed. (2nd) 365. So was a watchman in Grimberg v. Admiral Oriental Steamship Line, 300 Fed. 619, and many other cases are cited to show that the word "seaman" has a broader meaning than it had origi-

nally. In the days of sailing vessels, the word "seaman" meant one who could "hand, reef and steer," but the courts in attempting to keep up with changed conditions of navigation gave it an enlarged meaning. Meyer v. Dollar Steamship Line, 43 Fed. (2nd) 425.

The appellant, also, cites cases showing that masters [fol. 19] have been held to be seamen under different statutes than that under consideration.

In the case of Burns Bros., 29 Fed. (2nd) 855, it was held that a master was a seaman within the meaning of 28 U. S. C. A. 837 (June 12, 1917, C. 27, S. 1, 40 Stat. 157; July 1, 1918, C. 113, S. 1, 40 Stat. 683) which gave seamen the right to sue in Federal Courts to enforce laws made for their health and safety without prepayment of court costs.

In the case of In re Scott, 250 Fed. 647, the court held that the word "seaman" was broad enough to include "master" in matters of naturalization, and the court in the course of the opinion said: "It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context."

We are also cited to the case of The Balsa, 10 Fed. (2nd) 408, in which the court held that the master, injured in the service of the vessel, was entitled to recover, in libel, against her, the cost of his cure and maintenance. However, we do not believe that that case aids us much in construing the statute in question because the action was one not growing out of common law negligence, nor involving the construction of statutory law, but was one in admiralty.

We have examined the numerous other authorities cited by the appellant, but do not believe that they are sufficiently in point to burden this opinion by making reference to them, as none of them deal with the construction of the statute in question.

It is a general rule that in construing statutes or constitutions, the court may resort to extraneous matters to aid in arriving at a correct interpretation when, and only when, the meaning of the words used is ambiguous or uncertain. Hamilton v. St. Louis County Court, 15 Mo. 3; State ex rel. v. King, 44 Mo. 283; State ex rel. v. Gammon, 73 Mo. 421; State ex rel. v. Hitchcock, 241 Mo. 433, 146 S. W. 40.

In the case of State ex rel. v. The University of Missouri, 268 Mo. 598, 188 S. W. 126, we said:

"In such case we are not permitted for the purpose of [fol. 20] attempting to discover some hidden, some occult intent of the people, to resort to documents other than the constitution itself. It is only in case the meaning remains in doubt after the whole instrument is examined that the court may turn to extrinsic facts for aid in interpretation. When the words used themselves permit of no doubt as to the meaning, that ends the matter. There is no room for construction."

In Section 713, supra, Congress defines terms as used in this Chapter, namely, "master," "seaman," vessel" and "owner." By this section, the term "master" shall be deemed to be every person having the command of any vessel belonging to any citizen of the United States, and the term "seaman" is deemed to be every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the vessel. And then this section defines the terms "vessel" and "owner." This section distinguishes "master" from "seaman" as clearly as it does "vessel" from "owner." "Master" is defined to the exclusion of all others employed or engaged to serve in any capacity on board the vessel. We believe that the term "master" is used as separately and distinctly from the term "seaman" as if the act read: "Every person having the command of any vessel * * * shall be deemed to be the 'master' " and every other "person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman.' "

We believe that the words used in this section are not ambiguous or uncertain. Congress clearly expressed in the words it used in this section just what it intended and there is no room for construction.

The first part of Section 713, supra, says, "In the construction of this chapter;" then this section defines "master," and "seaman." The reading of this Chapter clearly shows that Congress had in mind the distinction between "master" and "seaman," and that the term "seaman" did not include the word "master."

To illustrate, in the following sections of this Chapter that the term "seaman" does not include "master" is [fol. 21] clearly shown by the context thereof. Section 561 says, "That the master to whom such boy (apprentice) is to be bound is a proper person for the purpose." Section 564 states that the master of every vessel bound from a port in the United States to any foreign port shall before he proceeds on such voyage make an agreement in writing or in printing with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall as nearly as possible be in the form given in the table marked "A," in the schedule annexed to this Chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same. Section 565, among other things, states: "When the crew is first engaged the agreement shall be signed in duplicate, and one part shall be retained by the shipping commissioner, and the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the first departure of the ship, and shall be delivered to the master." Section 571 is as follows: "Every master who engages any seaman in any place in which there is a consular officer, otherwise than as required by the proceding section, shall incur a penalty of not more than One Hundred Dollars, for which penalty the vessel shall be held liable." The first part of schedule "A," referred to in this section, reads as follows: "It is agreed between the master and the seaman or mariners of the —, of which — is at present master, or whoever shall go for master, now bound from the port of —, to —, 1. —."

The schedule and sections referred to above clearly show that the term "seaman" does not include the term "master." We, therefore, believe that Congress clearly intended to distinguish "master" from "seaman" and that the word "seaman" does not include the word "master" so as to give the master cause of action under Section 688 of this Chapter. Nor do we believe that the fact that the vessel was temporarily in charge of the pilot, at the time of the collision that caused Warner to be thrown into the river, would change the status of the captain or master to that of a seaman. He was still in command of the vessel, except insofar as her navigation was concerned.

In the case of The Oregon, 158 U. S. 168, 39 L. Ed. 943, 15 [fol. 22] Sup. Ct. Rep. 804, the United States Supreme Court said:

"Nor or we satisfied with the conduct of the master in leaving the pilot in sole charge of the vessel. While the pilot doubtless supercedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation; the master is not wholly absolved from his duties while the pilot is on board, and may advise with him, and even displace him in case he is intoxicated or manifestly incompetent. He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties. The Iona, L. R. 1 P. C. 426.

The Batzvier, 1 Spinks, Eccl. 378, 383, it was said by Dr. Lushington: 'There are many cases in which I should hold that, notwithstanding the pilot has charge, it is the duty of the master to prevent accidents, and not to abandon the vessel entirely to the pilot; but that there are certain duties he has to discharge (notwithstanding there is a pilot on board) for the benefit of the owners.' In an official report made by a maritime commission in 1874, the Elder Brethren of Trinity House are said to have expressed the opinion 'that in well conducted ships the master does not regard the presence of a duly licensed pilot in compulsory pilot waters as freeing him from every obligation to attend to the safety of the vessel; but that, while the master sees that his officers and crew duly attend to the pilot's orders, he himself is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist, not only to urge upon the pilot to use every precaution, but to insist upon such being taken.' Marsden Collisions, 255."

We do not believe that the master can be considered a [fol. 23] seaman within the purview of Sections 688 and 713, supra; the trial court properly sustained the demurrer to appellant's petition. The judgment of the trial court is, therefore, affirmed.

All concur.

Ernest M. Tipton, Judge.

[fol. 24] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 26] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 9, 1934

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
MAR 16 1934
CHARLES ELMORE CROPL
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. [redacted] 4

CLAIRE A. WARNER, Administratrix of the Estate of John M. Warner, Deceased,
Petitioner (Appellant Below),

vs.

EDWARD F. GOLTRA, Doing Business Under the Style and Name of the Goltra Barge Line.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

Samuel W. Fordyce,
Henry J. Richardson,
C. Powell Fordyce,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 870

CLAIRE A. WARNER, ADMINISTRATRIX OF THE ESTATE OF JOHN M. WARNER, DECEASED,
Petitioner (Appellant Below),

vs.

EDWARD F. GOLTRA, DOING BUSINESS UNDER THE STYLE AND NAME OF THE GOLTRA BARGE LINE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of Matter Involved.

The sole question involved in this proceeding may be stated as follows:

Whether the personal representatives of a deceased *master* of a vessel owned by a citizen of the United

States, who was killed as the result of the negligence of his employer, was granted a cause of action for damages for the death of such *master*, by section 33 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 688), which provides that the personal representative of a *seaman*, who is thus killed, may maintain an action at law for damages under the statutes of the United States conferring or regulating the right of action for death in the case of railway employes?

The Supreme Court of Missouri held that as the *master* of a vessel was not a *seaman*, no such cause of action was granted by said act.

This question originates in a suit filed in the Circuit Court of the City of St. Louis, Missouri. Said action was brought by your petitioner, Claire A. Warner, who is the widow, and administratrix of the estate of John M. Warner, for the purpose of recovering damages on behalf of her daughter and herself for the wrongful death of her said husband. The defendant was the respondent, Edward F. Goltra, who was then doing business under the name of the Goltra Barge Line, the main office of which was located in St. Louis, Missouri. In her second amended petition (R. 2) your petitioner alleged that at the time of his death Warner was employed by Goltra as captain or master of the towboat "Iowa," and was on board said vessel in the scope of his employment and course of his duties as such master, and was engaged in interstate commerce; that at said time the "Iowa" was being navigated and used by other agents and employees of Goltra to unground certain barges of freight, which it had previously been pushing down the Ohio River in interstate commerce, and which had become stuck upon a sandbar in said river; that in attempting to unground said barges the "Iowa" was so negligently and unskillfully managed by said other agents and

employees of Goltra that they caused it to collide violently with the grounded barges and the bank of said river; and that the shock or jar caused by said collision threw Captain Warner into the Ohio River where he was drowned.

In bringing said suit your petitioner believed that she was proceeding in accordance with rights and privileges granted to her by Section 33 of the Merchant Marine Act of June 5, 1920 (S. 688, C. 18, Title 46 U. S. C. A.; C. 250, S. 33, 41 Stat. 1007) which reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Respondent filed a general demurrer to said petition (R. 7). In support thereof he contended that under Sec. 713, C. 18, Title 46 U. S. C. A. (Act of June 7, 1872, C. 322, S. 65, 17 Stat. 277; R. S. Sec. 4612; December 21, 1898, C. 28, S. 23, 30 Stat. 762; March 4, 1915, C. 153, S. 10, 38 Stat. 1168), Warner, because he was a master of a vessel, was not a seaman within the meaning of Section 33 of the Merchant Marine Act, and that consequently Section 33 of said act gave no rights to his personal representative to sue

for his wrongful death. Section 713 of the Code reads in part as follows:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

The Circuit Court agreed with this contention, and sustained the demurrer (R. 7).

Thereafter your petitioner refused to plead further, allowed judgment to be entered against her upon said demurrer, and duly appealed to the Supreme Court of Missouri (R. 1-2).

The latter court affirmed the judgment of the Circuit Court (R. 11). In the course of its opinion (R. 11) the court said that the word "seaman" in Section 33 of the Merchant Marine Act must be construed in the light of the definitions contained in Section 713 of the Code. In regard to such definitions, the court stated:

> "We, therefore, believe that Congress clearly intended to distinguish 'master' from 'seaman' and that the word 'seaman' does not include the word 'master' so as to give the master a cause of action under Section 688 of this chapter." (Section 33 of the Merchant Marine Act.) (R. 16.)

The effect of this decision, if not reversed, will be to deny to masters, because they are masters, the remedial rights

granted by said section of the Merchant Marine Act to all other maritime employes.

II.

Reason Relied on for the Allowance of the Writ.

The Supreme Court of Missouri held that a *master* of a vessel is not a *seaman* within the meaning of Section 33 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 688), and that consequently said section granted to the personal representative of a deceased master, who was killed as the result of the negligence of his employer, no cause of action for damages for the death of such master. This decision, in effect, also denies to masters, who are injured as the result of the negligence of their employers, a right to sue at law for damages for such injury. As this decision vitally affects the welfare of all masters of vessels, which are owned by citizens of the United States, it involves a Federal question of substance. Such question has not heretofore been decided by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Missouri, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Missouri had in the case numbered and entitled on its docket No. 29648, Claire A. Warner, Administratrix of the Estate of John M. Warner, deceased, Appellant, *vs.* Edward F. Goltra, doing business under the style and name of the Goltra Barge Line, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Missouri Supreme

Court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated March 12, 1934.

CLAIRE A. WARNER,
Administratrix of the Estate of
John M. Warner, Deceased,
By SAMUEL W. FORDYCE,
HENRY J. RICHARDSON,
C. POWELL FORDYCE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 870

CLAIRE A. WARNER, ADMINISTRATRIX OF THE ESTATE OF JOHN M. WARNER, DECEASED,

Petitioner (Appellant Below),

vs.

EDWARD F. GOLTRA, DOING BUSINESS UNDER THE STYLE AND NAME OF THE GOLTRA BARGE LINE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the Supreme Court of Missouri (R. 11) has not yet been officially reported but may be found in 67 South Western (2d) Advance Sheets, page 47. The date of the opinion is December 20, 1933.

II.

Jurisdiction.

(1) The date of the judgment to be reviewed is December 20, 1933 (R. 11).

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237, as amended, of the Judicial Code (28 U. S. C. A. Sec. 344 (b)).

(3) Your petitioner framed the second amended petition (R. 2), which she filed in the Circuit Court of the City of St. Louis, Missouri, for the purpose of bringing an action under the statutes of the United States conferring and regulating the right of action for death in the case of railway employees (see 45 U. S. C. A. 51, Act April 22, 1908, C. 149, S. 1, 35 Stat. 65). She believed that section 33 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 688) gave her the right or privilege of bringing this suit, for she believed that her deceased husband, who was the master of a vessel, was a seaman within the meaning of said section. The pertinent parts of said section 33 provide that in the case of the death of any seaman as the result of personal injuries suffered in the course of his employment, his personal representative may maintain an action for damages at law with the right of trial by jury, and in such cases all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Respondent, defendant in said court, filed a general demurrer to said petition (R. 7). In support thereof he orally argued that petitioner's husband, because he was a master, was not a seaman. Petitioner orally argued to the contrary. The Circuit Court agreed with respondent's position and sustained the demurrer (R. 7). Upon petitioner's refusal to plead further, judgment was

entered against her, and she duly appealed to the Supreme Court of Missouri (R. 1-2). In the brief filed by her in the Supreme Court of Missouri the only questions raised by petitioner were (1) whether her husband was a seaman within the meaning of section 33, and (2) whether said section granted to her the Federal right or privilege of bringing an action for damages for his wrongful death. Respondent's brief did no more than oppose petitioner's contentions. Under the rules and practice of the procedure prevailing in the courts of Missouri, petitioner properly set up and claimed this Federal right and privilege. In its opinion (R. 11) the Supreme Court of Missouri treated these Federal questions as sufficiently raised, necessarily involved, and still open; specifically dealt with them on their merits; and unequivocally denied that said section 33 granted to your petitioner such Federal right and privilege. Without deciding said questions the Missouri Supreme Court could not otherwise have reached the result it did reach. The Supreme Court of Missouri is the highest court in said state in which a decision could be had.

(4) The cases believed to sustain the jurisdiction of this Court are as follows: *Ireland* v. *Woods*, 246 U. S. 323; and *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435. See also *Jamison et al.* v. *Encarnacion*, 281 U. S. 635, in which this Court assumed jurisdiction upon certiorari to determine a similar question as to the scope of Section 33 of the Merchant Marine Act.

III.

Statement of the Case.

A full statement of the case has been given in the petition, and in the interest of brevity will not be repeated here.

IV.

Specification of Error.

The Supreme Court of Missouri erred in holding that a master of a vessel is not a seaman within the meaning of Section 33 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 688), and that, therefore, said section grants no cause of action for the wrongful death of such master to his personal representative.

V.

Summary of Argument.

To explain the nature of the Federal questions decided by the Supreme Court of Missouri it is necessary to discuss briefly the following points:

A. History and Purpose of Section 33 of the Merchant Marine Act.

The purpose of the LaFollette Seamen's Act of March 4, 1915, was to promote the welfare of American seamen. Section 20 thereof abolished the Fellow-Servant Rule. Subsequently this Court decided that said act did not impose upon ship owners the same measure of liability for injuries to seamen as the common law prescribed in the case of land employers. To remedy this situation Section 20 was amended by Section 33 of the Merchant Marine Act of June 5, 1920. The purpose of the later act was to do whatever might be necessary to develop and encourage the maintenance of an American Merchant Marine.

Section 33 for the first time gave seamen a cause of action for damages for death. It supplants all state statutory and maritime law on the subject. It applies to all maritime employees. It was passed to promote the safety of such

persons and to require compensation for their injury and death to be treated as part of the cost of the business.

B. Meaning of the Language used in Section 33 of the Merchant Marine Act.

This section gives to the personal representative of deceased "seamen" a cause of action for damages for their death. Petitioner—believing that her deceased husband, a master, was a "seaman"—brought suit thereunder. The Supreme Court of Missouri denied that a master was a seaman, and stated that therefore, Section 33 gave her no cause of action. Such a decision was erroneous.

Numerous dictionaries and cases state that a master is a seaman. Moreover, the authorities which define the word "seaman" gave it a meaning broad enough to include a master.

The Supreme Court of Missouri ignored these definitions, and based its decision upon Section 713, Title 46 U. S. C. A. It stated also that Section 713 must be read in connection with Section 33, and that Section 713 excludes a master from the definition of the word "seaman."

We contend that Section 713, as contained in the Code, does not apply to Section 33. Section 713, as there written, is inconsistent with Section 65, Act of June 7, 1872, from which it is derived and upon which it is based. We must look, therefore, only to Section 65, which has never been repealed, and which by its terms does not and cannot apply to Section 33 of the Merchant Marine Act of 1920.

But even if Section 713 of the Code must be used to construe the language used in Section 33, Section 713 defines the word "seaman" in a manner broad enough to include a master.

The decision of the Supreme Court of Missouri, by denying to masters and their administrators the causes of action

and remedial rights granted by Congress to all other maritime employees, adversely affects the health, safety and welfare of all masters of all vessels owned by citizens of the United States.

The questions involved in such a decision are Federal questions of substance and great importance. Such questions have never been decided by this Court.

VI.

ARGUMENT.

The Supreme Court of Missouri has decided a Federal question of substance not heretofore determined by this Court.

In order to explain the nature of the Federal question decided by the Supreme Court of Missouri, it is necessary for us to discuss briefly (A) the history and purpose of Section 33 of the Merchant Marine Act, and (B) the meaning of the words used in said section.

(A) *History and purpose of Section 33 of the Merchant Marine Act.*

On March 4, 1915, Congress passed the LaFollette Seamen's Act, the purpose of which was to "promote the welfare of American seamen" (*Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 389). Section 20 of that act (C. 153, 38 Stat. 1164, 1185; Comp. Stat. 1916 ss. 8306, 8337a) providing:

> "In any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority."

This act was construed in *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, 384, 385, in which this Court said:

> "The language of the section discloses no intention to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore."

In 1919 various bills were introduced in Congress relative to the establishment of an American Merchant Marine. Those introduced in the Senate were referred to the Committee on Commerce, and hearings were had before it. At hearings during February, 1920, Mr. Andrew Furuseth, the President of the International Seamen's Union of North America, appeared before the Committee, convinced it that the United States could not successfully establish and maintain an adequate merchant marine without passing suitable laws to protect the men engaged in the operation thereof, called attention to the decision in the *Chelentis* case, *supra*, and, in order to give maritime employees the same rights as land employees, suggested the language of Section 33 of the Merchant Marine Act in substantially the same words as used in the final enactment thereof. (See U. S. Senate Hearings on Establishment of a Merchant Marine, pp. 1628, 1709 and 1712.) As a result of these hearings Section 33 was embodied in the Merchant Marine Act as an amendment of Section 20 of the La-Follette Act. (*Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 389.) The purpose and policy of the Merchant Marine Act, as expressed therein, is to "do whatever may be necessary to develop and encourage the maintenance of * * * a merchant marine." (See 46 U. S. C. A. 861 note; c. 250, s. 1, 41 Stat. 988; and *Panama Railroad Co.* v. *Johnson, supra.*)

By passing Section 33 of the Merchant Marine Act Congress substantially changed the preexisting maritime law under which no damages could be recovered for the death of one engaged in maritime pursuits. (*Lindgren* v. *U. S.*, 281 U. S. 38, 43.) It is spoken of as "an act of general application" which "covers the entire field of liability for injuries to seamen" (*Lindgren* v. *U. S., supra*); which "broadened the maritime law by giving seamen a new right" (*Kuhlman* v. *W. & A. Fletcher Co.*, 20 Fed. (2d) 465, 467); the policy of which "is directed to the safety of the men (engaged in maritime service) and to treating compensation for injuries to them as properly part of the costs of the business" (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52).

(B) *Meaning of the Language Used in Section 33 of the Merchant Marine Act.*

Section 33 of this Act (46 U. S. C. A. 688) reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Believing that her deceased husband, the master of the vessel "Iowa," was a seaman within the meaning of this act, petitioner brought suit thereunder to recover damages for his wrongful death.

The Supreme Court of Missouri, however, held that a master of a vessel was not a seaman, and that, therefore, this act gave petitioner no such cause of action. Such a decision is erroneous.

What is the meaning of the word "seaman", which is used in Section 33 of the Merchant Marine Act? Does it include a master, or does it include only those maritime employees of lower rank? As said act makes no reference to any other act of Congress, and as it does not itself attempt to define the word "seaman", we believe that resort must be had to cases and dictionaries in order to answer these questions.

Looking then only to such authorities, we find that they consider a master to be a seaman. Thus in the *Burns Bros., No. 31*, 29 Fed. (2d) 855, a suit in Admiralty for personal injuries, the court held that a master is a seaman within the meaning of 28 U. S. C. A. 837 (C. 27, s. 1, 40 Stat. 157, c. 113, s. 1, 40 Stat. 683) which gives to seamen the right to sue in Federal courts, to enforce laws made for their health and safety, without prepayment of costs. A similar holding was made in *In re Scott*, 250 Fed. 647, which involved the right of a master to become a naturalized citizen of the United States under Revised Statutes Sec. 2174 (Comp. Stat. 1916, s. 4357). By its terms said act applied only to seamen. In the course of the opinion the court said:

> " 'Seaman' is defined by Webster as:
>
> 'One whose occupation is to assist in the management of ships at sea; a mariner * * * applied both to officers and common sailors.'

"It is common knowledge that a man must be a seaman before he can be a master. It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context. If there is nothing in the context to show the sense in which the word is used, then it seems to us that it should be given the broadest meaning, so as to include a master, as well as a common seaman before the mast.

"Certainly an enabling act, such as this, should not receive such a narrow construction as to deprive one who comes within its terms of any rights given thereby, merely because he happens to be a high class man instead of a low class one. The fact that a man has made the most of his opportunities, and has risen to the head of his profession, should not bar him from receiving benefits conferred on his profession."

To the same effect is *The Balsa*, 10 Fed. (2) 408. Here a master libeled a vessel, charging her owners with negligence in failing to keep her in seaworthy condition and praying damages for his injury and the payment of his expense for cure and maintenance. The question involved was whether the rule which gives a seaman the right to recover his costs of cure and maintenance extented to the master. The court answered the question in the affirmative, stating:

"It would seem, *ratione rei*, there is no difference (except in degree) between the position of a master and that of a common seaman when it comes to an injury of one or the other as affecting the movement of the ship and her preservation to her owners; and no difference in the duty which in humanity (and self-interest) the owners owe one or the other. Though in different stations, each is a mariner, running the same risks, encountering the same dangers, engaged in the common adventure of sailing and safe-guarding the ship and her cargo. In this view, 'master, mates, sail-

> ors, surveyors, carpenters are mariners.' Benedict's Admiralty (4th Ed.) 189."

See also 56 C. J. p. 922, in which it is said: "Broadly speaking, the term 'seaman' includes a ship's officer, as well as her men."

In accord with these authorities are those dealing primarily with the definition of the word "seamen". They state that a seaman is any person employed or engaged to serve on board a vessel (see *United States* v. *Lindgren et al.*, 28 Fed. (2d) 725, 728); and any person employed in a vessel to assist in the main purpose of the voyage (see The Z. R. 3, 18 Fed. (2d) 122, 123). And in *The Buena Ventura*, 243 Fed. 797, 799, 800, it is said:

> "* * * every one is entitled to the privilege of a seaman who, like seamen at all contribute to and labor about the operation and welfare of the ship when she is upon a voyage.
>
> "* * * a man who serves the ship as the result of a contractual engagement of any kind, and serves her in navigation, is * * * entitled to the privilege of a seaman."

See also *The Sea Lark*, 14 Fed. (2d) 201; *Hoof* v. *Pacific-American Fisheries*, 284 Fed. 174, aff'd. 291 Fed. 306; and *Cassil* v. *U. S. E. F. Corp.*, 289 Fed. 774, 776.

Moreover, that a master is considered to be a seaman within Section 33 of the Merchant Marine Act is also indicated by certain decisions which consider that act in connection with the Longshoremen's and Harbor Worker's Compensation Act of March 4, 1927 (C. 509, 44 Stat. 1424, 33 U. S. C. A. ss. 901-950). That latter act provides for compensation when longshoremen or harbor workers are injured or killed upon navigable waters and specifically states that no compensation shall be payable in respect of the disability or death of a master or member of the crew of

any vessel (see 33 U. S. C. A. 903 (1), c. 509, s. 3, 44 Stat. 1426). The master and members of the crew were thus excepted because they were satisfied with the provisions of the Merchant Marine Act, and through their organized representative made known to Congress that they wished to remain outside of the latter act. (*Nogueira* v. *N. Y., N. H. & H. R. Co.*, 32 Fed (2d) 179, 181.) In speaking of the fact that they were so excepted, this court in *Nogueira* v. *N. Y. N. H. & H. R. Co.*, 281 U. S. 128, 134, 135, 136, said:

> "As to the *master* and *crew* of a vessel, it should be noted that Section 33 of the Merchant Marine Act (June 5), 1920 (Chap. 250, 41 Stat. at L. 988, 1007, U. S. C. Title 46, sec. 688) gave to *seamen* the rights and remedies under all statutes of the United States which were applicable to railway employees * * * thus carrying to seamen the benefit of the provisions of the Federal Employers' Liability Act.
>
> "It appears that the bill (Longshoremen's and Harborworker's Compensation Act) originally excluded a *master or member of a crew of a vessel,* but was amended so as to extend to them the benefit of compensation * * *. As *these seamen* preferred to remain outside of the provisions of the bill, they were finally excluded and the bill was passed with the exceptions above-quoted." (Matter in parenthesis supplied.)

If a master is not a seaman within the meaning of the Merchant Marine Act, then it is apparent that this Court was guilty of using very loose language in the *Nogueira* case, *supra.*

If we remember that Section 33 of the Merchant Marine Act is remedial legislation which must be liberally construed, and that the words used therein have a flexible meaning, (*International Stevedoring Co.* v. *Haverty, supra*), then it seems clear to us that the word "seaman" used in said section is broad enough to include a master of

a vessel. That word is a general one, which includes several classes of persons, and no authority justifies restricting it to one class, or in giving it the narrowest possible interpretation. The mischief to be redressed by the statute is equally applicable to all classes. (*In re Scott,* 250 Fed. 647, 648.)

The Supreme Court of Missouri, however, did not agree with these conclusions. It said that the word "seaman" in Section 33 of the Merchant Marine Act must be construed in the light of the definitions given in Section 713, Title 46 U. S. C. A. The pertinent parts of said section provide:

> "In the construction of this chapter every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a seaman * * *."

The Missouri Supreme Court also said:

> "We believe that the term 'master' is used as separately and distinctly from the term 'seaman' as if the act read: 'Every person having the command of any vessel * * * shall, be deemed to be the 'master,' and every other' person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'" (R. 15).

In our opinion the Missouri Supreme Court had no power or authority to use Section 713 of the Code (46 U. S. C. A. c. 18, s. 713) in determining the meaning of a word in Section 33 of the Merchant Marine Act (46 U. S. C. A. c. 18, s. 688). We make this statement in spite of the fact that where both sections were placed in Chapter 18, Title 46 of the Code, and in spite of the fact that Section 713 on its

face applies to all other provisions in said chapter. Our reason for so stating is that Section 713, as contained in the Code, does not represent any law enacted by Congress. According to the historical note contained under Section 713, Title 46 of the Code, said section is derived from, and based upon, Section 65 of the Act of June 7, 1872 (C. 322, s. 65, 17 Stat. 277). Section 65 reads in part as follows:

> "That to avoid doubt *in the construction of this act*, every person having the command of any ship belonging to any citizen of the United States shall, *within the meaning and for the purposes of this act*, be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a 'seaman' *within the meaning and for the purposes of this act* * * *"

This language is materially different from the language used in said Section 713 of the Code. Section 65, which has never been repealed, confines the definitions therein contained to the Act of June 7, 1872. To apply such definitions to the Merchant Marine Act of June 5, 1920, is to permit those who compiled the code, instead of Congress, to enact the laws of the United States. This can not be done.

Consequently, as Section 713 of the Code is not itself the enactment of a new law, does not repeal or amend any old law, and is inconsistent with Section 65 of the Act of June 7, 1872, we must give effect to Section 65 for all purposes.

> "The matter set forth in the Code * * * shall establish prima facie the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the

> Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code, and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments." Section 2a Act of June 30, 1926, Titles 1-4 U. S. C. A. page 3; Chapter 712, 44 Stat. at L. Pt. 1, 1.)

For these reasons, we say that Section 713 can not be used to construe the world "seaman" in Section 33 of the Merchant Marine Act; that Section 65 of the Act of June 7, 1872 can not be used for such purpose; and that under these circumstances the meaning of such word must be determined from the definitions given in the cases and dictionaries heretofore set forth.

But even if we assume, for the sake of argument, that the definitions in Section 713 of the Code must be resorted to, we still do not believe that they conclusively establish that a master is not a seaman. The mere fact that the first clause of said section defines the word "master," does not impliedly exclude a master from the broad, all inclusive definition given to the word "seaman" in the second clause. To hold to the contrary, we must change the statutory definition given to the latter word to read:

> "* * * and every person (*masters* and apprentices excepted) who shall be employed or engaged to serve in any capacity * * * shall be deemed * * * to be a 'seaman.'"

Congress did not so define the word "seaman." It excepted only apprentices. To thus change the definition violates the rule that exceptions in a statute are to be strictly construed, and are not to be interpreted so as to destroy its remedial purpose (*Piedmont & N. Ry. Co.* v. *U. S.*, 30 Fed. (2d) 421, 431); violates the rule that all that is not clearly embraced in an exception remains within the scope of the

principal provision (Sutherland "Statutory Construction," s. 328; and *Hopkins et al.* v. *U. S.*, 235 Fed. 95, 98); and violates the rule that where a legislative body has made a specific exception and has made no other exception or limitation, a conclusive presumption arises that it intended to make none (*Wabash R. R. Co.* v. *U. S.*, 178 Fed. 5, 11).

Conclusion.

The decision of the Supreme Court of Missouri adversely affects the health, safety, and welfare of all masters of vessels owned by citizens of the United States. It denies to them benefits granted by Congress to all other maritime employees, whether they be officers below the rank of master, ordinary seamen, or merely persons engaged to serve on board the vessel in some minor capacity. We cannot believe that Congress intended to make such an artificial classification among seamen—intended to deny to those, who have risen to the head of their profession, the rights conferred upon their profession—intended to exclude from the remedial provisions of Section 33 of the Merchant Marine Act one who runs the same risks, and encounters the same dangers as a common seaman. Whether Congress did so intend, is a Federal question of substance which has never been decided by this Court.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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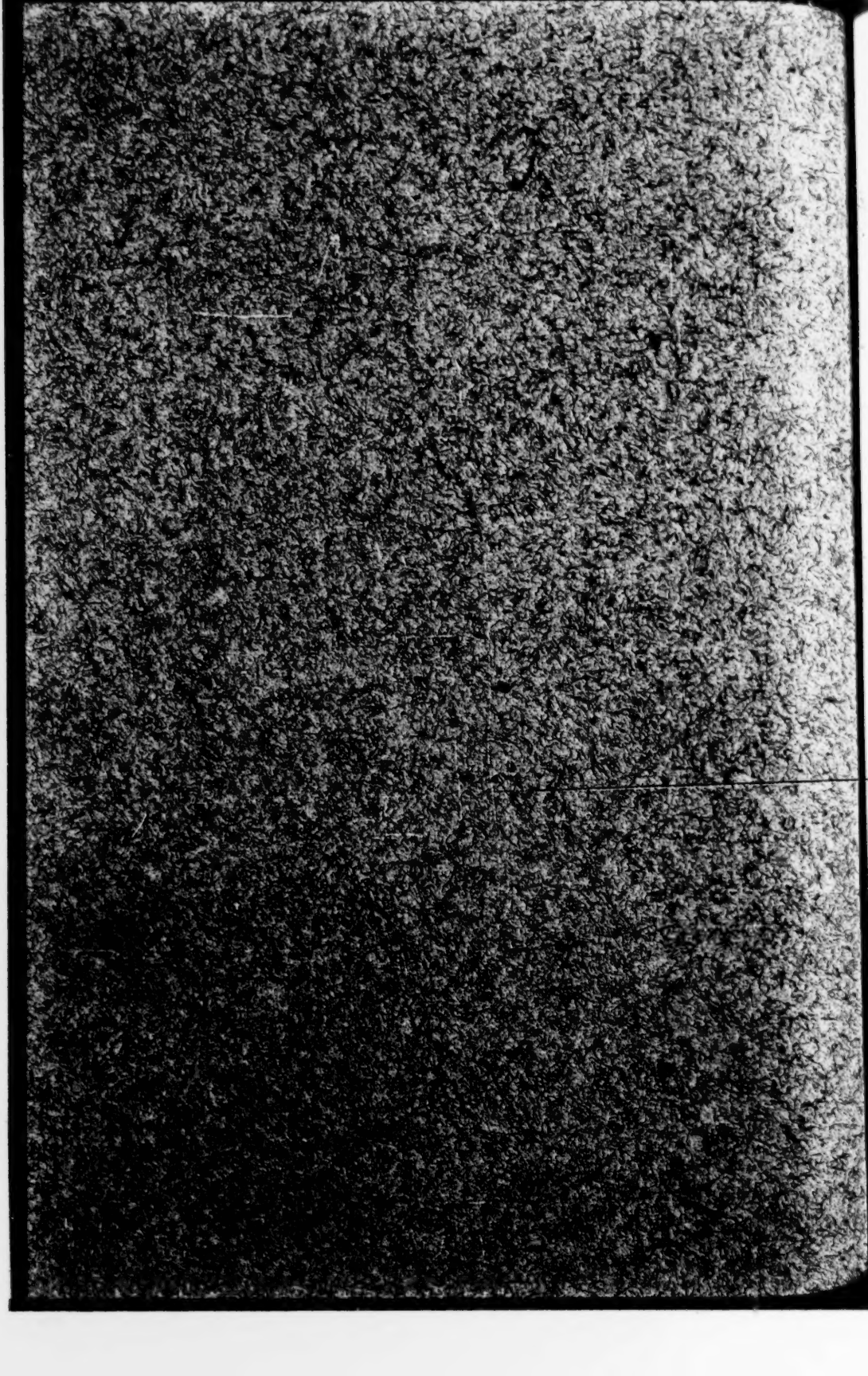

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SEP 17 1

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),
vs.
EDWARD F. GOLTRA, Doing Business Under the Style and Name of THE GOLTRA BARGE LINE.

No. [redacted] 4

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONER'S BRIEF ON THE MERITS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),
vs.
EDWARD F. GOLTRA, Doing Business Under the Style and Name of THE GOLTRA BARGE LINE.

No. 870.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONER'S BRIEF ON THE MERITS.

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri (R. 11) has not yet been officially reported, but may be found in 67 S. W. (2d) 47. The date of the opinion is December 20, 1933.

II.

JURISDICTION.

A full statement as to the jurisdiction of this Court is given on pages 8 and 9 of petitioner's petition for writ of certiorari and brief in support thereof and, in the interest of brevity, will not be here repeated.

This Court's writ of certiorari was granted April 9, 1934.

III.

STATEMENT OF THE CASE.

The sole question involved in this proceeding may be stated as follows:

> Whether the personal representative of a deceased **master** of a vessel owned by a citizen of the United States, who was killed as the result of the negligence of his employer, was granted a cause of action for damages for the death of such **master**, by Section 33 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 688), which provides that the personal representative of a **seaman**, who is thus killed, may maintain an action at law for damages under the statutes of the United States conferring or regulating the right of action for death in the case of railway employes?

The Supreme Court of Missouri held that as the master of a vessel was not a seaman, no such cause of action was granted by said act.

This question originates in a suit filed in the Circuit Court of the City of St. Louis, Missouri. Said action was brought by your petitioner, Claire A. Warner, who is the widow and administratrix of the estate of John M. Warner, for the purpose of recovering damages on behalf of her daughter and herself for the wrongful death of her said husband. The defendant was the respondent Edward F. Goltra, who was then doing business under the name of the Goltra Barge Line, the main office of which was located in St. Louis, Missouri. In her second amended petition (R. 2) your petitioner alleged that at the time of his death Warner was employed by Goltra as captain or master of the towboat "Iowa," was on board said vessel in the scope of his employment and course of his duties as such master, and was engaged in interstate commerce; that at said time the "Iowa" was being navigated and used by other agents and employes of Goltra to unground certain barges of freight which it had previously been pushing down the Ohio River in interstate commerce, and which had become stuck upon a sand bar in said river; that in attempting to unground said barges the "Iowa" was so negligently and unskillfully navigated and managed by said other agents and employes of Goltra that they caused it to collide violently with the grounded barges and the bank of said river, and that the shock or jar caused by said collision threw Captain Warner into the Ohio River where he was drowned.

In bringing said suit your petitioner believed that she

was proceeding in accordance with rights and privileges granted to her by Section 33 of the Merchant Marine Act of June 5, 1920 (S. 688, C. 18, Title 46, U. S. C. A.; C. 250, S. 33, 41 Stat. 1007), which reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employes shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employes shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Respondent filed a general demurrer to said petition (R. 7). In support thereof he contended that under Sec. 713, C. 18, Title 46, U. S. C. A. (Act of June 7, 1872, C. 322, S. 65, 17 Stat. 277; R. S., Sec. 4612; December 21, 1898, C. 28, S. 23, 30 Stat. 762; March 4, 1915, C. 153, S. 10, 38 Stat. 1168), Warner, because he was a master of a vessel, was not a seaman within the meaning of Section 33 of the Merchant Marine Act, and that consequently section 33 of said act gave no rights to his personal representative to

sue for his wrongful death. Section 713 of the Code reads, in part, as follows:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

The Circuit Court agreed with this contention, and sustained the demurrer (R. 7).

Thereafter your petitioner refused to plead further, allowed judgment to be entered against her upon said demurrer, and duly appealed to the Supreme Court of Missouri (R. 1-2).

The latter Court affirmed the judgment of the Circuit Court (R. 11). In the course of its opinion (R. 11) the Court said that the word "seaman" in Section 33 of the Merchant Marine Act must be construed in the light of the definitions contained in Section 713 of the Code. In regard to such definitions, the Court stated:

"We believe that the term 'master' is used as separately and distinctly from the term 'seaman' as if the act read: 'Every person having the command of any vessel * * * shall be deemed to be the 'master' and every other person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'" (R. 15).

"We, therefore, believe that Congress clearly intended to distinguish 'master' from 'seaman' and that the word 'seaman' does not include the word 'master' so as to give the master a cause of action under Section 688 of this chapter" (Section 33 of the Merchant Marine Act) (R. 16).

Petitioner contends that the decision of the Supreme Court of Missouri is clearly erroneous.

IV.

SPECIFICATION OF ERROR.

The Supreme Court of Missouri erred in holding that a master of a vessel is not a seaman within the meaning of Section 33 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 688), and that, therefore, said section grants no cause of action for the wrongful death of such master to his personal representative.

V.

SUMMARY OF ARGUMENT.

The only question involved in this case is whether the personal representative of a deceased master of a vessel, who is killed as the result of the negligence of his employer, is granted a cause of action for damages for the death of such master by Section 33 of the Merchant Marine Act of June 5, 1920 (Sec. 688, U. S. C., Title 46). This section provides that the personal representative of a deceased "seaman," who is thus killed, may maintain an action at law for damages under the statutes of the United States conferring our regulating the right of action for death in the case of railway employes. The determination of this question depends upon the construction to be given to two acts of Congress, viz.: (a) Section 33 of the Merchant Marine Act, and (b) Sec. 713, U. S. C., Title 46. These acts are considered separately.

A.

Section 33 of the Merchant Marine Act.

In order to establish that a master of a vessel is a seaman within the meaning of section 33, and that said section gives to the personal representative of a deceased master a cause of action for his death, we desire to call attention to (1) the provisions of the maritime law existing prior to its enactment; (2) its history and purpose;

(3) the rules sanctioned by this Court for construing it, and (4) the meaning of the word "seaman" used therein.

(1) **The provisions of the maritime law existing prior to the enactment of Section 33 of the Merchant Marine Act.**

Prior to the enactment of section 33, the general maritime law granted no cause of action for damages for the death of a seaman and granted inadequate remedies for negligent injury to such persons.

(2) **History and purpose of Section 33 of the Merchant Marine Act.**

In order to promote the welfare of American seamen Congress, in 1915, passed the La Follette's Seamen's Act, which abolished the fellow-servant rule. The hopes of the sponsors of that act apparently were disappointed by the decision in Chelentis v. Luckenbach Steamship Co., in which this Court held that said act did not provide maritime employes with the same measure of protection as land employes.

After the great war, during which thousands of ships were built in the United States, Congress decided to make this country into a first-class sea power. It realized, however, that to do so it had to attract men to the hazardous employment of working on such vessels. For this reason it passed Section 33 of the Merchant Marine Act.

The courts which had been called upon to apply this act

have stated its purposes to be: To change the prior maritime law by giving maritime employes, who have always been considered as wards of admiralty and as a favored class, broadened remedies for personal injury, and by giving their personal representatives a right to recover damages for their death; to substitute for the unjust fellow-servant rule the principle of respondeat superior in suits brought to enforce these rights; to give relief and protection to such men and those dependent upon their earnings; to promote their health, safety and welfare; to cause compensation for their injury or death to be treated as part of the cost of the business; to stimulate their employers to greater diligence for their safety, and to establish uniform, paramount and exclusive federal laws regarding maritime torts.

(3) **The rules sanctioned by this Court for construing Section 33 of the Merchant Marine Act.**

This Court has stated that section 33 should be liberally construed to carry out its beneficent purposes; that refinements of construction, which a different spirit might approve, should be disregarded, and that an adherence to the letter, which would defeat the obvious purposes of Congress and lessen the scope plainly intended to be given to the measure is not required.

Moreover, this Court has pointed out that the word "seaman" used in said section is flexible; has indicated that it can be read to include all of the meanings given

to it by the courts, and has said that, in determining whether or not a person is a seaman, the question to be decided is not whether such person was thought of for purposes of inclusion, but whether he was intentionally excluded.

(4) The meaning of the word "seaman" used in Section 33 of the Merchant Marine Act.

Section 33 of the Merchant Marine Act amends Section 20 of the La Follette Act. Neither of these acts refer to any other law of Congress—not even to Section 713, U. S. C., Title 46. Neither of them define the word "seaman." Consequently resort must be had to general authorities to determine the meaning of that word.

Numerous cases hold that a master of a vessel is a seaman. They point out that it is a matter of common knowledge that a man must be a seaman before he can be a master.

In accord with such cases are those which define the word "seaman" broadly enough to include a master. They state that that word includes all who are employed in the vessel to assist in the main purpose of the voyage; all who sign the ship's articles and are a part of the ship's company; all who practice or are employed in navigation, and as all who follow the sea as a profession or for a livelihood. Such cases also point out that the meaning of the word "seaman" has been enlarged to keep pace with changed conditions in navigation, and that a great many persons who

originally were not considered to be seamen are now deemed to be such.

Considering the purpose and policy of Section 33 of the Merchant Marine Act, these authorities are amply sufficient to justify this Court in holding that a master is a seaman within the meaning thereof.

The Supreme Court of Missouri did not agree with these conclusions. It held that section 33 must be construed in the light of the definitions contained in Section 713, U. S. C. A., Title 46, and that such definitions establish that a master is not a seaman. Such a decision is erroneous.

B.

Section 713, Title 46, U. S. C. A.

Section 713 reads in part as follows:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; * * *."

Construing this section, the Missouri Supreme Court said that as a master was defined in the first clause, he was impliedly excluded from the definition in the second clause.

In our opinion, the Missouri Supreme Court had no power or authority to use section 713, as contained in the Code,

for the purpose of interpreting section 33. Section 713, as there written, is inconsistent with Section 65 of the Act of June 7, 1872, from which it is derived and upon which it is based. We must look, therefore, only to section 65, which has never been repealed and which by its terms does not and cannot apply to Section 33 of the Merchant Marine Act of June 5, 1920.

But even if Section 713 of the Code must be used to interpret the language of section 33, we still do not believe that it (section 713) conclusively establishes that a master is not a seaman. Section 713 merely provides that, for the purpose of Chapter 18, U. S. C., Title 46, the word "seaman" shall include persons who might otherwise be deemed not to be seamen. It is directed to extension, not to restriction. To hold that a master is impliedly excluded from the definition of "seaman" in the second clause of section 713, because he is included in the first clause, is to impute to Congress the intent to separate a master from all other maritime employes, to put him in a different class, and to deny him alone the remedies of section 33. Such a classification is absurd, arbitrary, unreasonable, and discriminatory. Moreover, to so hold is to change the definition in the second clause to read: "And every person (**masters** and apprentices excepted) * * * shall be deemed to be a 'seaman.'" Congress did not so define the word "seaman." Unlike the British Parliament, which in the Merchant Shipping Acts of 1854 and 1894 specifically excepted a master from the definition of the word "seaman," Con-

gress excepted only apprentices. To thus change the definition in our law to accord with the British definition violates the rule that exceptions in statutes are to be strictly construed, and violates the rule that an express exception excludes all others.

For these reasons we contend that a master of a vessel is a seaman within the meaning of section 33, and that said section grants to the personal representative of a deceased master a cause of action for damages for his death. Consequently the judgment of the Missouri Supreme Court should be reversed and remanded.

VI.

ARGUMENT.

As stated above, the sole question involved in this proceeding is:

> Whether the personal representative of a deceased **master** of a vessel owned by a citizen of the United States, who is killed as the result of the negligence of his employer, is granted a cause of action for damages for the death of such **master** by Section 33 of the Merchant Marine Act of June 5, 1920 (Sec. 688, U. S. C., Title 46), which provides that the personal representative of a **seaman**, who is thus killed, may maintain an action at law for damages under the statutes of the United States conferring or regulating the right of action for death in the case of railway employes?

The determination of this question depends upon the construction to be given to the following acts of Congress: (A) Section 33 of the Merchant Marine Act of June 5, 1920 (Sec. 688, U. S. C., Title 46), and (B) Sec. 713, U. S. C., Title 46. These acts will be considered separately.

A.

Section 33 of the Merchant Marine Act of June 5, 1920.

In order to establish that the master of a vessel is a seaman within the meaning of section 33, and that said section gives to the personal representative of a deceased

master a cause of action for his death, we desire to call attention to (1) the provisions of the maritime law existing prior to its enactment; (2) its history and purpose; (3) the rules sanctioned by this Court for construing it, and (4) the meaning of the word "seaman" used therein.

(1) The provisions of the maritime law existing prior to the enactment of Section 33 of the Merchant Marine Act.

In two recent cases arising under section 33, this Court has described the remedies for the injury or death of a seaman granted by the general maritime law.

In speaking of the remedy for negligent injury, Mr. Justice Cardozo, in Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 370, 371, said:

> "By the general maritime law a seaman is without a remedy against the ship or her owners for injuries in his person, suffered in the line of service, with two exceptions only. A remedy is his if the injury has been suffered as a consequence of the unseaworthiness of the ship or a defect in her equipment. * * * A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.'"

And in referring to the remedy for wrongful death Mr. Justice Sanford, in Lindgren v. U. S., 281 U. S. 38, 43, 44, said:

> "Prior to the adoption of the Merchant Marine Act

> the general maritime law of the United States did not authorize any recovery of damages or indemnity for the death of a seaman, whether the injury was caused by the negligence of the owner or other members of the crew or the unseaworthiness of the vessel. * * * In this situation it was held, in the absence of any legislation by Congress, that where a seaman's death resulted from a maritime tort on navigable waters within a state whose statutes gave a right of action on account of death by wrongful act, the admiralty courts could entertain a libel in personam for the damages sustained by those to whom such right was given. * * * But, as said by the Circuit Court of Appeals, such statutes 'were not a part of the general maritime law,' and were recognized only because Congress had not legislated on the subject."

(2) **History and purpose of Section 33 of the Merchant Marine Act.**

The first attempt to broaden the remedies provided by the general maritime law took place in 1915. On March 4th of that year Congress passed the La Follette Seaman's Act, the declared purpose of which was to "promote the welfare of American seamen" (Panama Railway Co. v. Johnson, 264 U. S. 375, 389). Section 20 of that act (C. 153, 38 Stat. 1164, 1185; Comp. Stat. 1916, Secs. 8306, 8337a; U. S. C. A., Title 46, Sec. 688, note) provides:

> "In any suit to recover damages for any injury sustained on board vessel or in its service, seamen having

command shall not be held to be fellow-servants with those under their authority."

This act was construed in Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 384, 385, in which this Court said:

> "The language of the section discloses no intention to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employes on shore."

In 1919 Congress was concerned with the disposition to be made of the numerous ships built during the Great War. (See 46 U. S. C. A. 861 et seq.). Many bills in regard to this subject were introduced in the Senate, and by it referred to the committee on commerce. Said committee, after protracted hearings, came to the conclusion that with these ships the United States could, and should, become a first-class sea power. (See Report No. 573, Senate Committee on Commerce, 66th Congress, 2nd Session.) At hearings during February, 1920, Mr. Andrew Furuseth, the president of the International Seamen's Union of North America, appeared before the committee, convinced it that the United States could not successfully establish and maintain an adequate merchant marine without passing suitable laws to protect the men engaged in the operation thereof, called attention to the decision in the Chelentis case, supra, and, in order to give maritime employes the same rights as land employes, suggested the language of Section 33 of the Mer-

chant Marine Act in substantially the same words as used in the final enactment thereof. (See U. S. Senate Hearings on Establishment of a Merchant Marine, pp. 1628, 1709 and 1712.) As a result of these hearings Section 33 was embodied in the Merchant Marine Act as an amendment to Section 20 of the LaFollette Act (Panama Railroad Co. v. Johnson, 264 U. S. 375, 389). The purpose and policy of the Merchant Marine Act is to "do whatever may be necessary to develop and encourage the maintenance of * * * a merchant marine" (46 U. S. C. A., Sec. 861, and note thereunder, c. 250, S. 1, 41 Stat. 988, and Panama Ry. Co. v. Johnson, supra).

The purpose of Congress in passing Section 33 of the Merchant Marine Act is indicated also by the remarks of the courts which have been called upon to apply it. Thus, in Lindgren v. U. S., 281 U. S. 38, 44, Mr. Justice Sanford, after commenting upon the absence of a remedy for death in the general maritime law, said:

> "By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted from personal injuries, the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act."

Similarly, in Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 371, 372, Mr. Justice Cardozo, after discussing

the limited remedies for negligent injury given by the general maritime law, said:

> "The question then is to what extent the ancient rule has been changed by modern statutes. Section 33 of the Merchant Marine Act of (June 5) 1920, commonly known as the Jones Act (41 Stat. at L. 1007, chap. 250, S. 33, U. S. C. Title 46, S. 688), gives a cause of action to the seaman who has suffered personal injury through the negligence of his employer. For death resulting from such injury it gives a cause of action to his personal representative."

Again, in Kuhlman v. W. A. & Fletcher Co., 20 Fed. (2d) 465, 467, the Circuit Court of Appeals for the Third Circuit said:

> "This section broadened the maritime law by giving a seaman a new right—a right at law—through proceedings in personam, according to the course of the common law, on the common-law side of federal district courts. State courts also have like jurisdiction (Engel v. Davenport, 271 U. S. 33, 46 S. Ct. 410, 70 L. Ed. 813). By so doing the Congress did not abrogate his old action in admiralty, but gave him an entirely new action and allowed him a clear option to assert his old action in admiralty on the admiralty side of the district court with trial to the Court or to assert his new action, based on negligence, on the law side with right of trial by jury (Panama R. R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; Engel v. Davenport, 271 U. S. 33, 36, 46 S. Ct. 410, 70 L. Ed. 813)."

Furthermore, in International Stevedoring Co. v. Haverty, 272 U. S. 50, 52, Mr. Justice Holmes, in regard to section 33, said:

> "The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business."

See, also, Bainbridge v. Merchants & Miners Transportation Co., 287 U. S. 278, in which it was held that section 33 is a law made for the health and safety of seamen within the provisions of Chap. 113, 40 Stat. at L. 683, U. S. C., Title 28, Sec. 837, and Foster v. U. S., 46 Fed. (2d) 359, 360, in which the Court pointed out that section 33 was passed to encourage those who desired to engage in maritime service.

The following cases, which deal primarily with the effect of section 33, are also of assistance in determining the intent of Congress in passing it:

In Lindgren v. U. S., 281 U. S. 38, the Court said:

> "* * * the Merchant Marine Act * * * establishes * * * a rule of general application in reference to the liability of owners of vessels for injuries to seamen * * * (p. 46).
>
> "* * * it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject" (p. 47).

And in Uravic v. F. Jarka Co., Inc., 282 U. S. 234, 240, 241, this Court pointed out that the Merchant Marine Act abolished the fellow-servant rule as to maritime torts, and stated:

> "At the argument it was suggested that the case should be governed by the general maritime law. This means, as we have indicated, by the law of the United States, with the provisions of Sec. 33 left out. It is assumed that by the law so qualified a master would not be liable to a servant for an injury caused by the negligence of a fellow servant. But that doctrine is of relatively recent appearance in admiralty following the common law (The City of Alexandria [D. C.], 17 Fed. 390). And, as we believe, it was introduced into the common law almost within the memory of men still living upon a principle of policy (Labatt, Mast. & S., Secs. 471 et seq., Sec. 484; 2d ed., Secs. 1394, 1408). It would be somewhat hard to maintain that principle as still the policy of the law in this case after the doctrine has been abolished for railroad employes and seamen. (See International Stevedoring Co. v. Haverty, 272 U. S. 50, 52, 71 L. ed. 157, 159, 47 S. Ct. 19.)"

See, also, Jamison v. Encarnacion, 281 U. S. 635, 639, 640, in which Mr. Justice Butler, in regard to the Federal Employers' Liability Act, which by reference is made a part of Section 33 of the Merchant Marine Act, said that the measure was adopted for the relief of a large class of persons employed in a hazardous work; that it completely abrogates the fellow-servant rule and applies the

principle of respondeat superior; and that it is intended to stimulate employers to greater diligence for the safety of their employes.

So much for the history, purposes and effect of section 33. How should it be construed? The courts have answered this question in numerous decisions.

(3) **The rules sanctioned by this Court for construing Section 33 of the Merchant Marine Act.**

In Cortes v. Baltimore Insular Line, 287 U. S. 367, 375, Mr. Justice Cardozo used the following language:

> "This Court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent upon his earnings (Jamison v. Encarnacion, 281 U. S. 635 * * *). Approaching the decision of this case in a like spirit of liberality, we put aside many of the refinements of construction that a different spirit might approve."

Again, in Bainbridge v. Merchants & Miners Transportation Co., 287 U. S. 278, 282, Mr. Justice Sutherland said:

> "Seamen have always been regarded as wards of admiralty * * *. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class * * *. In light of and to effectuate that policy statutes enacted for their benefit should be liberally construed."

In addition, in Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 377, the Court said:

> "This Court has said that 'the ancient characterization of seamen as wards of admiralty is even more accurate now than it was formerly' (Robertson v. Baldwin, 165 U. S. 275, 287)."

Furthermore, in Jamison v. Encarnacion, 281 U. S. 635, 640, the following statement occurs:

> "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure * * *. The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used."

Incidentally, it should be noted that these remarks are as pertinent to the construction of the word "seaman" in section 33 as to the word "negligence."

From the above quotations it is apparent that section 33 as a whole should be liberally construed for the benefit of all maritime employes. The following cases establish that the word "seaman" used therein should also be construed with the same spirit:

International Stevedoring Co. v. Haverty, 272 U. S. 50, 52. The question here involved was whether a stevedore was a "seaman" within the meaning of section 33. In answering this question in the affirmative, and in overruling the older cases which held to the contrary, Mr. Justice Holmes said:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' **But words are flexible.** The work upon which the plaintiff was engaged was a maritime service * * *. In view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a century, we are of opinion that a **wider scope should be given to the words of the act**, and that in this statute 'seaman' is to be taken to include stevedores employed in maritime work on navigable water, as the plaintiff was, whatever it might make in laws of a different kind." (Matter in parenthesis supplied.)

Before leaving this case we wish to point out that even though it might be said that some of the old definitions of the word "seaman" exclude the master of a vessel, this case provides direct authority for considering the word "seaman" in section 33 as flexible, and as sufficiently broad and general to include a master. Unless it is so considered, masters will be denied all of the remedial rights and privileges granted by section 33, will be left to the inadequate maritime law, and will find themselves confronted with the fellow-servant rule which Congress has discarded for

nearly all other employes over whom it has jurisdiction to legislate.

Uravic v. F. Jarka Company, Inc., 282 U. S. 234, 239, 240, also bears out these contentions. The issue there before the Court was whether or not section 33 applied to an American citizen who, as a stevedore, was helping unload a ship flying the German flag in the harbor of New York. It is true that this issue is different from that involved in the case at bar. However, the following language of the Court has a direct bearing upon the question of whether the word "seaman" in section 33 should be construed as broad enough to include a master:

> "But the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them * * *. Here we are dealing with the conduct of persons within the jurisdiction (of the United States) affecting the safety of other persons within it. If the rule (of section 33) is wise, there is no reason why it should not be universal. Wise or not, it is law, and the question is why general words should not be generally applied." (Matter in parenthesis supplied.)

The following quotation is also pertinent:

> "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discussed and considered: (1) What was the common

law before the making of the act? (2) What was the mischief and defect for which the common law did not provide? (3) What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief" (Heydon's Case, 3 Co. 7, 1 Bl. Com. 61, 87). (See, also, Cooley's Blackstone, 4th Ed., Vol. I, p. 88.)

To sum up: The maritime law existing prior to the passage of the LaFollette and the Merchant Marine Acts provided no remedy for the death of a maritime employe, and provided only inadequate remedies for negligent injuries to such persons. In order to cure this mischief and to promote the welfare of American seamen Congress in 1915 passed the LaFollette Act. The hopes of the sponsors of that act apparently were disappointed by the decision in Chelentis v. Luckenbach Steamship Co., supra, in which this Court held that it did not provide maritime employes with the same measure of protection as land employes. After the Great War, during which thousands of ships were built in the United States, Congress decided to make this country a first-class sea power. It realized, however, that to do so it had to attract men to the hazardous employment of working upon such vessels. For this reason it passed Section 33 of the Merchant Marine Act in June, 1920. Construing this act, the courts have stated its pur-

poses to be: to change the prior maritime law by giving seamen, who have always been considered as wards of admiralty and as a favored class, broadened remedies for personal injury, and by giving their representatives a right to recover damages for their death; to substitute for the unjust fellow-servant rule the principle of respondeat superior in suits brought to enforce these rights; to give relief and protection to such men, and those dependent upon their earnings; to promote their health, safety and welfare; to cause compensation for their injury or death to be treated as part of the cost of the business; to stimulate their employers to greater diligence for their safety, and to establish uniform, paramount and exclusive federal laws regarding maritime torts. These being the beneficent purposes of this act, general words used therein, such as "seaman," should be liberally and broadly interpreted so as to extend the remedies therein provided to all maritime employes, whether they be master, junior officer or common seaman. Such words are flexible and are to be generally applied. In determining whether a master is a seaman within the meaning of the act, the question is not whether he was thought of for the purpose of inclusion, but whether he was intentionally excluded. And in passing upon this question the office of this Court is to suppress the mischief of the old maritime law, and to advance the remedies of the Merchant Marine Act—to suppress subtle inventions and evasions for the continuance of the mischief.

With these general principles in mind, let us consider the precise question here involved.

(4) The meaning of the word "seaman" used in Section 33 of the Merchant Marine Act.

Section 33 of the Merchant Marine Act (U. S. C., Title 46, Sec. 688, reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employes shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employes shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

This act amends Section 20 of the LaFollette Act. As neither of these acts refers to any other law of Congress—not even to Sec. 713, U. S. C., Title 46—and as neither of them defines the word "seaman," resort must be had to authorities of general application to determine the meaning of that word.

Such authorities consider a master to be a seaman. Thus, in the Burns Bros., No. 31, 29 Fed. (2d) 855, a suit in admiralty for personal injuries, the Court held that a master is a seaman within the meaning of 28 U. S. C. A. 837 (C. 27, s. 1, 40 Stat. 157, c. 113, s. 1, 40 Stat. 683), which gives to seamen the right to sue in federal courts to enforce laws made for their health and safety, without prepayment of costs. A similar holding was made In re Scott, 250 Fed. 647, 648, which involved the right of a master to become a naturalized citizen of the United States under Revised Statutes, Sec. 2174 (Comp. Stat. 1916, s. 4357). By its terms said act applied only to seamen. In the course of the opinion the Court said:

> " 'Seaman' is defined by Webster as:
>
> > " 'One whose occupation is to assist in the management of ships at sea; a mariner * * *; applied both to officers and common mariners.'
>
> "It is common knowledge that a man must be a seaman before he can be a master. It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context. If there is nothing in the context to show the sense in which the word is used, then it seems to me that it should be given the broadest meaning, so as to include a master, as well as a common seaman before the mast.
>
> "Certainly an enabling act, such as this, should not receive such a narrow construction as to deprive one who comes within its terms of any rights thereby

given, merely because he happened to be a high-class man instead of a low-class one. The fact that a man has made the most of his opportunities, and has risen to the head of his profession, should not bar him from receiving the benefits conferred on his profession."

* * * * * * *

"I have found no case in which the identical question now raised has been considered, but there are certain cases that are very persuasive by analogy as to the construction to be given this act. Judge Story, in United States v. Winn, 28 Fed. Cas. No. 16,740, where the question was the construction of Act Cong. March 3, 1835, c. 40, Sec. 3, 4 Stat. 776, providing that, 'if any master or other officer, etc., shall from malice, hatred, or revenge, and without justifiable cause, beat, wound or imprison any one or more of the crew,' etc., he shall be punished by fine, etc., in construing that statute, says:

" 'Now I do not think anything material in the construction of this statute can turn upon the rule, so ably and strenuously expounded at the bar, that penal statutes are to be construed strictly. I agree to that rule in its true and sober sense; and that is that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. BUT WHERE THE WORDS ARE GENERAL, AND INCLUDE SEVERAL CLASSES OF PERSONS, I KNOW OF NO AUTHORITY WHICH WOULD JUSTIFY THE COURT IN RESTRICTING THEM TO ONE CLASS, OR IN GIVING THEM THE NARROWEST INTERPRETATION, WHERE THE MISCHIEF TO BE REDRESSED BY THE STATUTE IS EQUALLY APPLICABLE TO ALL OF

> THEM. And where a word is used in a statute, which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature.' "

To the same effect is The Balsa, 10 Fed. (2) 408. Here a master libeled a vessel, charging her owners with negligence in failing to keep her in seaworthy condition and praying damages for his injury and the payment of his expense for cure and maintenance. The question involved was whether the rule which gives a seaman the right to recover his costs of cure and maintenance extended to the master. The Court answered the question in the affirmative, stating:

> "It would seem, ratione rei, there is no difference (except in degree) between the position of a master and that of a common seaman when it comes to an injury of one or the other as affecting the movement of the ship and her preservation to her owners; and no difference in the duty which in humanity (and self-interest) the owners owe one or the other. Though in different stations, each is a mariner, running the same risks, encountering the same dangers, engaged in the

> common adventure of sailing and safe-guarding the ship and her cargo. In this view, 'master, mates, sailors, surveyors, carpenters are mariners' (Benedict's Admiralty [4th Ed.] 189)."

See, also, 56 C. J., p. 922, in which it is said:

> "Broadly speaking, the term 'seaman' includes a ship's officer, as well as her men."

Moreover, that a master is considered to be a seaman within Section 33 of the Merchant Marine Act is also indicated by certain decisions which consider that act in connection with the Longshoremen's and Harbor Worker's Compensation Act of March 4, 1927 (C. 509, 44 Stat. 1424, 33 U. S. C. A. Supp., ss. 901-950). That latter act provides for compensation when longshoremen or harbor workers are injured or killed upon navigable waters and specifically states that no compensation shall be payable in respect of the disability or death of a master or member of the crew of any vessel (see 33 U. S. C. A. 903 [1], c. 509, s. 3, 44 Stat. 1426). The master and members of the crew were thus excepted because they were satisfied with the provisions of the Merchant Marine Act, and through their organized representative made known to Congress that they wished to remain outside of the latter act (Nogueira v. N. Y. N. H. & H. R. Co., 32 Fed. [2d] 179, 181). In speaking of the fact that they were so excepted, this Court in Nogueira v. N. Y. N. H. & H. R. Co., 281 U. S. 128, 134, 135, 136, said:

"**As to the master and crew** of a vessel, it should be noted that Section 33 of the Merchant Marine Act (June 5), 1920 (Chap. 250, 41 Stat., at L. 988, 1007, U. S. C., Title 46, sec. 688), gave to **seamen** the rights and remedies under all statutes of the United States which were applicable to railway employes * * * thus carrying to seamen the benefit of the provisions of the Federal Employers' Liability Act.

"It appears that the bill (Longshoremen's and Harborworker's Compensation Act) originally excluded **a master or member of a crew of a vessel**, but was amended so as to extend to them the benefit of compensation * * *. AS THESE SEAMEN preferred to remain outside of the provisions of the bill, they were finally excluded and the bill was passed with the exceptions above quoted." (Matter in parenthesis supplied.)

If a master is not a seaman within the meaning of the Merchant Marine Act, then it is apparent that this Court was guilty of using very loose language in the Nogueira case, supra.

In this connection see also In re Eastern Transport Co., 37 Fed. (2d) 355, where the Court apparently allowed the personal representative of a deceased master to recover under section 33. Similarly, in the petition of The Clyde Steamship Co., 16 Fed. (2d) 930, affirmed 18 Fed. (2d) 1015, and certiorari denied, 275 U. S. 529, the administratrix of one holding a master's license was allowed to recover. And in The Petition of Crosby Fisheries, Inc.,

31 Fed. (2d) 1004, the Court said that section 33 was broad enough to include officers, and allowed recovery by a mate who was acting as master.

In accord with these authorities are the following, which, although dealing primarily with the word "seaman," define it broadly enough to include a master:

The Z—R. 3, 18 Fed. (2d) 122, 123: "Changing conditions and necessities for changes, extended the term to include all persons employed in a vessel to assist in the main purpose of the voyage."

U. S. v. Atlantic Transport Co., 188 Fed. 42, 43: "* * * all * * * who sign a ship's articles for a voyage or succession of voyages, being part of the ship's company, may be considered as seamen * * *."

U. S. v. Nelson, 100 Fed. 125, 126: "The term 'seamen' * * * clearly means those Americans who practice or are employed in navigation—whose avocation is that of mariner."

Webster's New International Dictionary, "Seaman": "One whose occupation is to assist in the management of ships at sea; a mariner; * * *; applied both to officers and especially to common sailors. Opposed to landsman. Specif: (a) In the **English Merchant Shipping Act**, s. 742 (1894), any person (**except masters**, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship; (b) in the **United States**

Revised Statutes (Sec. 4612), any person **(apprentices excepted)** employed or engaged to serve in any capacity on board a vessel."

Zell's Cyclopedia Dictionary: "One who follows the sea as a profession or for a livelihood; one skilled in navigation or seamanship."

See, also, The Buena Ventura, 243 Fed. 797, 799, 800: "* * *—everyone is entitled to the privilege of a seaman who, like seamen, at all contribute to and labor about the operation and welfare of the ship when she is upon a voyage * * *. * * * a man who serves the ship as the result of a contractual engagement of any kind, and serves her in navigation * * *."

As to the changing meaning of the word "seaman," see further The Sea Lark, 14 Fed. (2d) 201; Hoof v. Pacific-American Fisheries, 284 Fed. 174, 176, affirmed 291 Fed. 306; Cassil v. U. S. E. F. Corp., 289 Fed. 774, 776, and The Herdis, 22 Fed. (2d) 304, 305.

Originally, in the days of sailing vessels, the word "seaman" meant one who could "hand, reef and steer," but the courts in attempting to keep up with changed conditions in navigation have given it an enlarged meaning (Meyer v. Dollar Steamship Line, 43 Fed. [2d] 425, 426; The Buena Ventura, 243 Fed. 797, 799; The Sea Lark, 14 Fed. [2d] 201). Consequently the following persons have been held to be seamen: The owner of an orchestra (The Sea Lark, supra); a cook (Allen v. Hallett, 1 Fed. Cas.

No. 223, pp. 472, 473); a fireman (The North American, 18 Fed. Cas., p. 339); an employe of a dredge (Saylor v. Taylor, 77 Fed. 476); a wireless operator (The Buena Ventura, supra); a carpenter (Kuhlman v. W. & A. Fletcher Co., 20 Fed. [2d] 465; Rogosich v. Union Dry Dock & Repair Co., 67 Fed. [2d] 377); a horseman (U. S. v. Atlantic Transport Co., 188 Fed. 42, 43); a diver (DeGaetano v. Merritt & Chapman D. & W. Co., 203 App. Div. 259, 196 N. Y. S. 573); an engineer of a dredging barge (City of Los Angeles v. United Dredging Co., 14 Fed. [2d] 365); a watchman (Grimberg v. Admiral Oriental Steamship Line, 300 Fed. 619); a pilot (The Mary Elizabeth, 24 Fed. 397); a cooper (U. S. v. Thompson, 28 Fed. Cas. 102); a hand on a river boat (Martin v. Acker, 16 Fed. Cas., p. 884); and a surgeon, porter, and chamber maid (see Meyer v. Dollar Steamship Line, supra).

Surely if all of the above persons are to be classed as seamen and allowed to recover under the Merchant Marine Act, a master should also. He is employed to serve on board a vessel and to assist in the main purpose of the voyage. He contributes to the welfare of the ship and serves her in navigation. He runs the same risks, encounters the same dangers, and is engaged in the common adventure of sailing and safeguarding his employer's vessel and its cargo. The only difference between him and the persons mentioned above, is that his work is more important than theirs, and his presence on board the vessel more necessary.

Remembering, therefore, that Section 33 of the Merchant

Marine Act is remedial legislation which must be liberally construed, and that the words used therein have a flexible meaning, it seems clear to us that the word "seaman" used in said section is broad enough to include a master of a vessel. That word is a general one, which includes several classes of persons, and no authority justifies restricting it to one class, or in giving it the narrowest possible interpretation. The mischief to be redressed by the statute is equally applicable to all classes.

The Supreme Court of Missouri, however, did not agree with these conclusions. In its opinion (R. 13) it said that Section 33 of the Merchant Marine Act must be construed in the light of the definitions given in Section 713, U. S. C., Title 46; and that the latter section establishes that a master of a vessel is not a seaman. We believe such a statement to be erroneous.

B.

Section 713, U. S. C., Title 46.

Section 713, U. S. C., Title 46, reads as follows:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel

navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

Construing said section the Missouri Supreme Court in its opinion said:

"We believe that the term 'master' is used as separately and distinctly from the term 'seaman' as if the act read: 'Every person having the command of any vessel * * * shall be deemed to be the "master" and every other "person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman"' (R. 15).

"We, therefore, believe that Congress clearly intended to distinguish 'master' from 'seaman' and that the word 'seaman' does not include the word 'master' so as to give the master a cause of action under section 688 of this chapter" (Section 33 of the Merchant Marine Act) (R. 16).

In our opinion the Missouri Supreme Court had no power or authority to use Section 713 of the Code in determining the meaning of a word in Section 33 of the Merchant Marine Act. We make this statement in spite of the fact that both sections were placed in chapter 18, title 46, by those who compiled the code, and in spite of the fact that section 713 on its face applies to all other provisions in said chapter. Our reason for so stating is

that section 713, as contained in the code, does not represent any law enacted by Congress. According to the historical note under section 713, said section is derived from, and is based upon, Section 65 of the Act of June 7, 1872 (C. 322, S. 65, 17 Stat. 277). Section 65 reads, in part, as follows:

> "That to avoid doubt **in the construction of this act,** every person having the command of any ship belonging to any citizen of the United States shall, **within the meaning and for the purposes of this act,** be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a 'seaman' **within the meaning and for the purposes of this act** * * *."

This language is materially different from the language used in Section 713 of the Code. Section 65, which has never been repealed, confines the definition therein contained to the Act of June 7, 1872, and possibly to subsequent amendments of that act. It should be noted, however, that Section 20 of the LaFollette Act does not amend any prior law of the United States (see said act in pamphlet entitled, "Public—No. 302—63d Congress, S. 136," Section 20, page 24), and that Section 33 of the Merchant Marine Act simply amends Section 20 of the LaFollette Act. Therefore, to apply the definitions in Section 65 of the Act of 1872 to the Merchant Marine Act of June 5, 1920, the

purpose and policy of which is entirely different from the act of 1872, is to permit those who compiled the Code, instead of Congress, to enact the laws of the United States. This cannot be done. Thus, as said in 59 C. J., p. 893:

> "* * * a compiler is not a lawmaker, * * * codification is not legislation * * *, and a statute neither gains nor loses force by the place it occupies in the collection of laws. Its sanction * * * depends upon its own terms, and would be the same if it had been printed anywhere else in the Code."

Consequently, as Section 713 of the Code is not itself the enactment of a new law, does not repeal or amend any old law, and is inconsistent with Section 65 of the Act of June 7, 1872, we must give effect to section 65 for all purposes.

> "The matter set forth in the Code, * * * shall establish prima facie the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code, and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments" (Section 2a, Act of June 30, 1926, Titles 1-4, U. S. C. A., page 4, Chapter 712, 44 Stat. at L., Pt. 1, 1).

For these reasons we say that section 713 cannot be

used to construe the word "seaman" in Section 33 of the Merchant Marine Act; that the express words of Section 65 of the Act of June 7, 1872, prevent it from being used for such purpose; and that under these circumstances the meaning of such word must be determined from the general authorities set forth under part "A" hereof.

But even if we assume, for the sake of argument, that the definitions in Section 713 of the Code must be resorted to, we still do not believe that they conclusively establish that a master is not a seaman. They merely provide that, for the purposes of Ch. 18, Title 46, U. S. C., the word "seaman" shall include persons who might otherwise be deemed not to be seamen. They are directed to extension, not to restriction (Uravic v. F. Jarka Co., Inc., 282 U. S. 234, 239). Moreover, the mere fact that the first clause of said section defines the word "master," does not impliedly exclude a master from the broad, all inclusive definition given to the word "seaman" in the second clause. To hold that he is excluded is to impute to Congress the intent to separate him (the master) from all other maritime employes, whether they be mates, pilots, common seamen, or others merely incidentally assisting in the main purpose of the voyage, and to deny him alone the remedial rights and privileges granted by Section 33 of the Merchant Marine Act. Under no construction of section 713 can it be said that these other officers and lesser employes are not seamen. Such an attitude is absurd, arbitrary, unreasonable, discriminatory and obvi-

ously defeats the purposes of Congress. Moreover, to hold that a master is not included within the second clause of section 713, we must change the statutory definition of the word seaman to read:

> "* * * and every person (**masters and** apprentices excepted) who shall be employed or engaged to serve in any capacity * * * shall be deemed * * * to be a 'seaman.'"

Congress did not so define the word "seaman." Unlike the British Parliament (see reference to English Merchant Shipping Act of 1894 in quotation above from Webster's New International Dictionary), Congress excepted only apprentices. To thus change our definition to accord with the British definition, violates the rule that exceptions in statutes should be strictly construed, and that all doubts should be resolved in favor of the general provision rather than the exception (59 C. J., p. 1092; Piedmont & N. Ry. Co. v. U. S., 30 Fed. [2d] 421, 431); violates the rule that an express exception excludes all others (59 C. J., p. 1092; Bend v. Hoyt, 13 Pet. 262, 271, 272; Hopkins et al. v. U. S., 235 Fed. 95, 98); and violates the rule that where a legislative body has made a specific exception and has made no other exception or limitation, a conclusive presumption arises that it intended to make none (Wabash R. R. Co. v. U. S., 178 Fed. 5, 11).

Before closing we wish to answer certain arguments made by the respondent in his brief in opposition to the granting of the writ of certiorari.

On page 15 et seq. of said brief respondent contends that petitioner is granted no cause of action by Section 33 of the Merchant Marine Act because she has not sufficiently alleged that her husband was engaged in interstate commerce at the time of his death. We believe that her allegations in this regard are sufficient (see R. p. 5). However, such a contention is erroneous because it ignores the fact that Congress' power to legislate upon maritime matters is derived from Article III, Section 2, of the Constitution of the United States, and not from its jurisdiction over interstate commerce. Being so derived, the nature of the commerce in which a seaman is employed at the time of his injury or death is not material. (See London Guaranty Accident Co. v. Industrial Acc. Com., 279 U. S. 109, 124, and U. S. v. Burlington etc. Ferry Co., 21 Fed. 331, 336, 339.)

On page 17 of said brief respondent says that Section 33 of the Merchant Marine Act (Section 688, U. S. C., Title 46) amends Chapter 18 of the Merchant Marine Act. This statement is untrue. The opening provision of section 33 reads as follows:

> "That Section 20 of such Act of March 4, 1915, be, and is, amended to read as follows: * * *"

(See "Public—No. 261—66th Congress, H. R. 10378," page 22, section 33). Chapter 18 of Title 46 of the Code is purely an invention of those who compiled the law.

On page 23 of said brief respondent quotes at length from The Arina, 12 P. & D. 118, 123; Connor v. Flora, 6

Can. Exch. 131, 132, and Corbett v. Pearce, 2 K. B. L. T. Rep. (n. s.) 781, in order to establish that a master is not considered to be a seaman. These cases tend to confuse rather than to clarify the issue, for they all involve British Merchant Shipping Act of 1854, which, unlike Section 713 of our Code, expressly excepts masters from the definition of the word "seaman."

It is true, as stated by respondent on page 23 et seq. of said brief, that there are certain authorities which, for some purposes, state that a master is not a seaman. These authorities are distinguishable, however, upon the ground that they deal with matters which are alien in their nature to the subject matter of Section 33 of the Merchant Marine Act. Moreover, it should be remembered that, although a master may not be a seaman for some purposes, yet he is an agent of the owner of the vessel just as much as the lowliest deck hand (24 R. C. L., "Shipping," Secs. 172 and 174; 36 Cyc, p. 125; The J. P. Donaldson, 167 U. S. 599, 603). He can be discharged at any time, at any place, and for any cause which seems to the owner to be sufficient (Montgomery v. Henry, 1 U. S. [1 Dall.] 49; Childs v. Gladding, Fed. Cas. No. 2678; 24 R. C. L., "Shipping," Sec. 156; 36 Cyc, p. 122; Benedict on Admiralty, 5th Ed., Vol. 1, page 105). His compensation is generally fixed by agreement between him and the owner (24 R. C. L., "Shipping," Sec. 157). He is subject to the control of the owner at all times (Ward v. Ruckman, 96 N. Y. 26, 37). And he must obey the instructions of the owner (24 R. C. L.,

"Shipping," Sec. 168, p. 1131). Under these circumstances he is an employe. (See Roberts Federal Liability of Carriers, 2d Ed., Vol. 2, p. 1380, in which it is said:

> "Under the well-settled principles of the common law, the existence of the relation of master and servant is generally tested by a consideration of four elements: (1) Selection and engagement of the servant; (2) payment of wages; (3) power of dismissal, and (4) the power to control the actions of the servant; and the coincidence in one person of these four elements undoubtedly constitutes such person the * * * employer."

Being an employe, a master of a vessel should be entitled to all the privileges granted to a seaman. There is no difference in the duty which in humanity and self-interest the owner owes one or the other. Though in different stations, each is a mariner, running the same risks, encountering the same dangers, engaged in the common adventure of sailing and safeguarding the ship and her cargo.

On pages 27 and 28 of said brief, respondent seeks to support his contentions by saying that we must keep in mind the general law of master and servant to the effect that a master is not liable to the superior for damages resulting from the negligence of his subordinate. This doctrine is not applicable in the case at bar because, being a refinement of the old fellow-servant rule, it was abolished by Section 33 of the Merchant Marine Act. Furthermore, it is not applicable because the pilot of the Iowa, whose

negligence was responsible for Captain Warner's death (petitioner's husband), was not his subordinate. At the time of the accident the pilot was in complete and exclusive control of the navigation of the vessel. (See 24 R. C. L., "Shipping," Sec. 255; Atlee v. The Northwestern Packet Co., 21 Wall. 389, 396, 397, 22 L. ed. 619, 621; Cooley v. The Board of Wardens, 12 How. 299, 316, 13 L. ed. 996, and Homer-Ramsdell Transportation Co. v. Companie Generale Transatlantique, 63 Fed. 845, 847.) See, also, U. S. v. The Science, Fed. Cas. No. 16,239, in which it was held that a master, who without being licensed performs the duty of a pilot, is subject to a fine.

CONCLUSION.

For all of these reasons we believe that a master of a vessel is a seaman within the meaning which Congress intended to give to Section 33 of the Merchant Marine Act, and that as such he and his personal representatives are entitled to the remedies granted by that act. We submit, therefore, that this case should be reversed and remanded.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),
vs.
EDWARD F. GOLTRA, Doing Business Under the Style and Name of THE GOLTRA BARGE LINE.

No. 870.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONER'S REPLY BRIEF ON THE MERITS.

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IN THE

Supreme Court of the United States.

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CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased, Petitioner (Appellant Below), vs. EDWARD F. GOLTRA, Doing Business Under the Style and Name of THE GOLTRA BARGE LINE.	No. 870.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONER'S REPLY BRIEF ON THE MERITS.

In our original brief we pointed out that, by passing the Merchant Marine Act (Chapter 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. A., Sec. 688) and the Longshoremen's and Harbor Workers' Compensation Act (Chapter 509, 44 Stat. 1424, 33 U. S. C. A. Supp., Secs. 901-950), Congress expressed its intent to grant new causes of action for the injury or death of all of those maritime employes over

whom it is given jurisdiction to legislate by Article III, Section 2 of the Constitution. Furthermore, we pointed out that this intent would be partially frustrated if the word "seaman," in section 33 of the former act, were construed so as to exclude the most important maritime employe, viz., the master.

In spite of these considerations the respondent, in his answer brief, strenuously opposes our contentions. Stripped to its essential elements, his argument is bottomed upon two propositions. First, that certain old cases exist which hold that for some purposes a master is not considered to be a seaman. Second, that other sections of Chapter 18, Title 46 of the United States Code—wherein, as section 688, is found section 33 of the Merchant Marine Act—show that Congress meant to differentiate between a master and a seaman. While these arguments have a superficial appeal, neither of them will stand critical analysis.

As to the first proposition: The cases of The Arina, 12 P. and D. 118; Connor v. Flora, 6 Can. Exch. 131, and Corbett v. Pearce, 2 K. B. L. T. Rep. (n. s.) 781, 20 T. L. R. 473 (Respondent's brief on merits, p. 21), are based upon the British Merchant's Shipping Act, which, unlike our own statute (U. S. C. A., Title 46, Sec. 713), expressly excludes a master from the definition of the word "seaman." For this reason alone, such cases cannot control. Furthermore, the most that can be said for the cases of M. Vandercook, 24 Fed. 472, and The Atlantic, 53 Fed. 607, cited

by the respondent on pages 21-22 of his brief, is that they indicate—although the point is not directly involved—that formerly, for some purposes, a master was not considered to be a seaman. But these authorities are not conclusive, for more recent American cases take an opposite view. (See Petitioner's brief on merits, pp. 28-34.)

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances in which it is used."

As to the respondent's second proposition: It is true that Section 33 of the Merchant Marine Act is now to be found in Chapter 18, Title 46 of the United States Code. And it is also true that certain sections thereof lend some support to the theory that a master is different from a seaman. However, it must not be forgotten that chapter 18, title 46, is purely an invention of those who compiled the Code—an arrangement or classification made solely for convenience of reference (Takao Ozawa v. U. S., 260 U. S. 178, 193; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 213). Compilers are not lawmakers (Paulson v. Hurlburt, 93 Ore. 419, 426; see, also, Sec. 2a, Act of June 30, 1926, Titles 1-4, U. S. C. A., p. 4, ch. 712, 44 Stat. at L. Pt. 1, 1). Neither the power to legislate nor the power to amend the laws can be delegated to them (State v. Gaunt, 13 Ore. 115, 116). Inclusion of an earlier statutory provision in

the Code does not operate as a re-enactment (Smiley v. Holm, 285 U. S. 355, 373). The mere accident that independent laws, passed at different sessions of the legislature, are collocated under one title or chapter in a Code, cannot be regarded as making them a part of one legislative scheme (Weatherly v. Capitol City Water Co., 115 Ala. 156, 171) — cannot change the original meaning, force, effect, scope or purpose which the lawmaking body intended them to have (State v. Gaunt, supra; Logan v. U. S., 144 U. S. 263, 302; Anderson v. Pacific Coast Steamship Co., 225 U. S. 187, 198, 199; Buck Stove & Range Co. v. Vickers, supra; Strottman v. Ry. Co., 211 Mo. 227, 257; Paddock v. Ry. Co., 155 Mo. 524, 536, and Sutherland on Statutory Construction, Vol. 2, p. 857)—cannot be permitted to operate to change the law and thereby defeat the will of Congress (Page v. Burnstine, 102 U. S. 664, 669). A statute neither gains nor loses force by the place it occupies in a collection of laws; its sanction depends upon its own terms, and would be the same as if it had been printed anywhere else in the Code (Paulson v. Hurlburt, supra; Ex parte Tillman, 84 S. C. 552, 558, and Pierce City v. Hentschel, Mo. Sup. Ct., 210 S. W. 31, 32, not officially published). The mere arrangement or location of a law by the revisors does not make it a part of the statutes with which it is grouped, so as to qualify its meaning. (See Aloe v. Ins. Co., 164 Mo. 675, Mo. Sup. Ct. en banc.)

It is our contention, therefore, that Section 33 of the

Merchant Marine Act neither gains nor loses force by the fact that it occurs in Chapter 18 of Title 46 of the United States Code. The other parts of that chapter cannot be used to qualify its meaning or to change it. To solve the problem presented in this case we must look to the original act. (See U. S. v. Hirsh, 100 U. S. 33, 35, and U. S. v. Lacher, 134 U. S. 624.) And if Congress in 1920, when it passed the Merchant Marine Act, intended the word "seaman" to include a master, this Court must give it that meaning in spite of section 713 and all of the other sections contained in chapter 18. That it did so intend is shown by the authorities cited in our original brief. Moreover, such intent is also indicated by the fact that section 33 amended, or rather supplanted, Section 20 of the La Follette Seaman's Act (Ch. 153, 38 Stat. 1185, 46 U. S. C. A., Sec. 688, note), in which the following words occurred, **"seamen having command."** Of themselves, these words imply that Congress considered that a person could have command and still be a seaman.

Finally, even if this Court should be of the opinion that the meaning of the word "seaman" in Section 33 of the Merchant Marine Act is not clear, we believe that the effect of this case will be so important, and so far reaching, that this Court is amply justified in resorting to the rule that the literal meaning of a word may be sacrificed in order that the legislative purpose may not fail (Takao Ozawa v. U. S., 260 U. S. 178, 194; Helvering v. N. Y. Trust Co.,

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Respectfully submitted,

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CHARLES ELMO

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. [redacted] 4

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),

vs.

EDWARD F. GOLTRA, Doing Business Under the Style and Name of the GOLTRA BARGE LINE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION.

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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 870.

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),

vs.

EDWARD F. GOLTRA, Doing Business Under the Style and Name of the GOLTRA BARGE LINE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION.

I.

OPINION OF COURT BELOW.

The petitioner's statement in her brief herein correctly states the facts under this division.

II.

JURISDICTION.

The jurisdictional facts stated in petitioner's brief herein are correct, with the exception that petitioner, under paragraph (3), undertakes to state certain facts and also undertakes to state the issues presented to the Supreme Court of Missouri. There is a variance as to the statement of these facts and issues, as will appear under respondent's statement of the case.

III.

STATEMENT OF THE CASE.

Petitioner filed her petition for damages against respondent in the Circuit Court of the City of St. Louis, Missouri, returnable to a term of said court prior to February 2, 1929, to which respondent entered a general demurrer, which was sustained by the Court. Petitioner then filed her amended petition, wherein, as to the material parts, she alleged: That on or about May 11, 1926, respondent, as "Goltra Barge Line," was operating on the Mississippi and Ohio Rivers as a common carrier transporting freight in interstate commerce and in that connection operated a certain vessel named "Iowa"; that deceased, John M. Warner, was at that time employed by respondent on the "Iowa" as captain or master, charged with the duties "required by custom and law of the duly

licensed captain or master of the 'Iowa' "; that the presence of the deceased, Warner, on board the "Iowa" in the capacity of captain or master, at that time, was required by Section 222, Title 46, of Mason's U. S. Code Annotated 1926, and as required by the rules and regulations of the Steamboat Inspection Service of the Department of Commerce, which rules and regulations are by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926 given the force and effect of laws; that on said day, although deceased, Warner, had a license to act as captain or master on both said rivers, he had no authority or license as a pilot to navigate the "Iowa" on the Ohio River; that respondent was required under aforementioned law, rules and regulations to employ a duly licensed pilot to operate and navigate the "Iowa" while in the Ohio River, and respondent had so complied therewith; that although deceased, Warner, on said day, was on board said "Iowa," acting in the course of his employment and scope of his duties as a captain or master, he was not and could not act as pilot, and he was not in actual operation, navigation and management of said "Iowa" on said date, but that these duties were then being performed by the pilot who was employed and engaged by respondent to serve on board said "Iowa," but who was not under the direction or control of deceased, Warner, and could not be in view of Section 28 of Rule 5 of the General Rules and Regulations prescribed by the Steamboat Inspection Service of the Department of Commerce; that on said day,

while deceased, Warner, was employed by respondent and was serving on board said "Iowa" as captain or master in the course of his employment for respondent, and while he was engaged in interstate commerce, and while the said "Iowa" was actually being used in interstate commerce, the respondent, by and through his servants and employes, was using said "Iowa" to tow and push several barges of freight from points in Pennsylvania to points in Louisiana; that at said time the water in the Ohio River was dangerously low, but under express instructions from respondent his servants and employes were ordered by respondent to continue said voyage; that when said "Iowa" and its barges reached a point in the Ohio River near Stevensport, Kentucky, some of the barges became grounded; that while said "Iowa" was being navigated, used and controlled "by agents, servants and employes of said defendant, other than said John M. Warner," to unground said barges, "the said agents, servants and employes of the defendant, other than the said John M. Warner, and independently of him and while said John M. Warner was not cognizant of exactly what was being done on all parts of the said 'Iowa,' so negligently, carelessly * * * handled * * * operated and navigated" said "Iowa" that they caused said "Iowa" to collide violently with the barges and the bank of the river; "that at this time the said John M. Warner was attempting to save his own life and the lives of those on board the said 'Iowa' and was attempting to save the

property of the defendant from further injury"; that as a result of said negligence and violent collision caused by the negligence of respondent, his servants and employes "other than the said John M. Warner," said Warner was thrown from said "Iowa" into the river and caused to drown (Rec. 3-6).

To this amended petition respondent filed a general demurrer, which was sustained by the Circuit Court of the City of St. Louis. This petitioner refused to further plead and judgment was entered against her on the pleadings. She appealed to the Supreme Court of Missouri (Rec. 1).

The respondent, in the Supreme Court of Missouri, presented the following issues:

> "1. Does 'Merchant Seaman,' as used in the title of the so-called 'Jones Amendment (June 5, 1920)' to the 'Merchant Marine Act,' Chapter 18, making the 'Federal Employers' Liability Act' applicable to 'Seamen' as well as to 'Employes' of railroads, and the term 'Seaman' as used in the act include the captain or master of a ship or vessel?
>
> "This question, presented, is contra to appellant's statement of the same proposition.
>
> "2. Do the allegations in the petition bring the case within the act, in that the petition fails to allege that the deceased, at the time of the injury or accident, was engaged in interstate commerce?"

The Supreme Court of Missouri sustained the Circuit Court of the City of St. Louis, upon the issues presented, and concluded:

"We do not believe that the master can be considered a seaman within the purview of sections 688 and 713, supra; the trial court properly sustained the demurrer to appellant's petition" (Rec. 17).

IV.

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR.

The Supreme Court of Missouri did not commit error in so affirming the Circuit Court of the City of St. Louis, and correctly concluded that "We do not believe that the master can be considered a seaman within the purview of Sections 688 and 713" (of U. S. C. A., Title 46).

V.

SUMMARY OF ARGUMENT.

For convenience, respondent will follow the outline or summary of petitioner's brief herein filed.

A. *History and purpose of Section 33 of the Merchant Marine Act.*

Respondent agrees that it was the intent of Congress to promote the welfare of American seamen by enacting the "Merchant Marine Act" (Chapter 18), and that the amendments thereto (Section 33, Jones' Act, June 5, 1920) made the provisions of the Federal Employers' Liability Act applicable to seamen, but does not and cannot agree that Congress, by enacting section 33 intended the pro-

visions thereof to cover the master of a vessel or one who stands in the position of vice-principal, no more than it was the intent of Congress in the Federal Employers' Liability Act to extend the provisions thereof beyond the "employes" of railroads, and no more than it was a legislative intent to extend the Workmen's Compensation Acts or the Wrongful Death Statutes beyond the class designated for whose benefit such acts were passed.

The petitioner elected to bring her action under this act, although she had an adequate remedy under the state Wrongful Death Statute.

B. *Meaning of the language used in Section 33 of the Merchant Marine Act.*

Although petitioner had an adequate remedy for the death of her husband under the state Wrongful Death Statute, she attempted to bring herself under the provisions of section 33 by attempting to show and allege that at the time of the alleged collision the captain or master was not, at that moment, so engaged in order that he may be classified as a seaman, and so elected her remedy.

In her desire to bring herself within the provisions of section 33, by attempting to allege, at the time of the accident, her deceased husband was a seaman and not a captain or master, petitioner made certain allegations which takes her case from without another essential provision, namely, that the deceased, at the time of the accident, was engaged in interstate commerce.

While the remedial benefits of an act like section 33 will be liberally construed so as to give effect to those who are entitled to enjoy the benefits thereunder, still the act will be strictly construed as to persons seeking this benefit in determining the persons or classes of persons who are entitled to its benefits.

The courts, by judicial interpretation, will not read into this Act of Congress the inclusion of persons or classes of persons not clearly intended by Congress to be included, which would thereby enlarge the class of persons entitled to the benefits.

The Supreme Court of Missouri correctly decided that petitioner's second amended petition does not state a cause of action under the Federal Employers' Liability Act, as same is made applicable to "Seamen" under Section 33 (Jones' Amendment, June 5, 1920) of the Merchant Marine Act, and correctly affirmed the judgment of the Circuit Court of the City of St. Louis, in holding that petitioner is not entitled, under her allegations, to recover thereunder.

The Supreme Court of Missouri correctly interpreted and construed said Act of Congress in accordance with the well-known rules of construction, in accordance with accepted definitions of the terms "master" and "seaman," as used in the Merchant Marine Act, as defined by our courts, by legal text-writers, by standard dictionaries, and as defined by Congress in section 713 of the same chapter (Section 713, Title 46, Chapter 18, U. S. C. A., and Mason's

U. S. Code), and correctly held and decided that the master of a vessel cannot be included in the term "seaman" as used in section 33 (Section 688, Title 46, Chapter 18, U. S. C. A., and Mason's U. S. Code).

The Supreme Court of Missouri correctly held and decided that under the general rule in construing statutes or constitutions the court may resort to extraneous matters to aid in arriving at a correct interpretation when, and only when, the meaning of the words used is ambiguous or uncertain, but the words used under the act now being considered are not ambiguous or uncertain.

Even though said term "seamen" as here used were considered ambiguous or uncertain to warrant the Court resorting to hearings before the Senate Committee such extraneous matters would sustain the interpretation or construction thereof by the Supreme Court of Missouri.

Since the act applies only to similar cases as provided under the Federal Employers' Liability Act for personal injury or death resulting, the decision of the Supreme Court of Missouri does not deny to a master of a vessel the remedial rights granted by Congress to all other maritime employes, adversely affecting the health, safety and welfare of all masters of all vessels owned by citizens of the United States.

The Supreme Court of Missouri having correctly interpreted and construed the act under consideration and having correctly decided the issues here presented, the writ of certiorari should be denied.

VI.

ARGUMENT.

The decision of the Supreme Court of Missouri correctly held and decided that petitioner's second amended petition does not allege facts sufficient to state a cause of action under the Federal Employers' Liability Act, as same is made applicable to "Seamen" under the Jones Amendment, June 5, 1920, Section 33, to the Merchant Marine Act (Section 688 of Chapter 18, Title 46, U. S. C. A., and Mason's U. S. Code), and, therefore, the petition for writ of certiorari should be denied.

A. *History and Purpose of Section 33 of the Merchant Marine Act.*

Since petitioner seeks to bring her action under Section 33 of the Merchant Marine Act, and has so elected, instead of bringing her action under the State Wrongful Death Statute, and she now undertakes to justify her election by reviewing the history and purpose of said Act, respondent will give the history and purpose thereof.

The Federal Employers' Liability Act (35 U. S. St. At. L. 65, C. 149, 45 U. S. C. A. 51) was enacted to give to employes of railroads, engaged in interstate commerce, certain rights of action to recover damages for personal injury (or death resulting). Prior to 1920 the provisions of that Act were limited to employes of railroads and were not appli-

cable to seamen employed on boats or vessels (The Pawnee, 205 Fed. 333, 334).

On June 5, 1920, Section 33 was, by Act of Congress, made a part of Chapter 250 of 41 Statutes at Large, page 1007. The title of Chapter 250 is, "An Act to provide for the promotion and maintenance of the American Merchant Marine, to repeal certain emergency legislation and to provide for the disposition, regulation and use of property acquired thereunder and for other purposes."

Said Section 33, also known as the Jones Amendment, June 5, 1920, to the Merchant Marine Act, makes the Federal Employers' Liability Act, heretofore applicable to railroad employes exclusively, applicable to any seaman who shall suffer personal injury in the course of his employment, and to the personal representative of any seaman who meets his death as a result of any such personal injury.

This Section 33 became and is Section 688 of Chapter 18, Title 46 of the U. S. C. A. and of Mason's U. S. Code. Title 46 is designated "Shipping." Chapter 18 is entitled "Merchant Seamen."

Under the same Chapter and Title is Section 713, entitled "Definitions, Schedule and Tables," and indexed as "Definitions of Statutory Terms" (Section 713 of Chapter 18, Title 46, U. S. C. A. and Mason's U. S. Code). The terms "Master," "Seaman," "Vessel," "Owner" are herein separately and exclusively defined.

Respondent will elaborate upon the history and purpose

of Section 33 and reply to the balance of petitioner's brief under this subdivision in the following subdivision of his brief.

B. *Meaning of the language used in Section 33 of the Merchant Marine Act.*

The petitioner had a remedy for the death of her husband, Captain Warner, under the State Wrongful Death Statute, but concluded and elected to institute her action under Section 33 of the Merchant Marine Act (Section 688, Title 46, Chap. 18, U. S. C. A., also Mason's U. S. Code).

Her second amended petition, filed in the Circuit Court of the City of St. Louis (Rec. 2-6), discloses her apprehension as to being able to bring herself within the class of persons entitled to the remedy sought. A construction of the second amended petition clearly indicates that she was aware of the difference or distinction between a master of a vessel and a seaman. She pleads Section 222, Title 46, Mason's U. S. Code, to indicate that her deceased husband was required to be a licensed master and that the navigation of the vessel required the presence thereon of a licensed master as distinguished from a seaman. Said section 222, part of which is incorporated in said second amended petition, clearly indicates this distinction. The portion of said section not incorporated in said petition reads as follows:

"If any such vessel is deprived of the services of

any number of the crew, including certified lifeboat men, separately stated, without the consent, fault or collusion of the master, owner or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage; provided that the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill."

This is further demonstrated by pleading the rules and regulations of the Steamboat Inspection Service of the Department of Commerce, which rules and regulations are, by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926, given the force and effect of laws.

Section 28 of the Rules and Regulations of the Steamboat Inspection Service of the Department of Commerce, referred to and relied upon, is entitled "Masters of River Steamers," and specifically provides for the inspection and examination of all applicants for original license as masters of steamers navigating rivers exclusively, and therein sets forth a schedule for the character of examination of applicants for original license as master of river steamers and therein provides for the examination as to his general knowledge of the duties of master, his ability to handle the wheel in case of emergency or disaster, his knowledge of proper management of a vessel and crew in

case of collision, and as to his executive ability generally to manage officers and crew.

She also pleads therein Section 224, Title 46 of Mason's U. S. Code Annotated 1926, which falls under the general title "Shipping," under chapter 11 thereof, entitled "Officers and Crews of Vessels," and said section 224 is entitled "Licenses of Officers by Inspectors." Said section provides for a board of local inspectors, who shall license and classify the masters, chief mates, second and third mates, etc.

Realizing her difficulties to bring herself within the class of persons, "seamen," entitled to the remedies under section 33, she studiously attempts to circumvent and alleges that her husband was the captain or master of the particular vessel, but not in charge thereof at the particular moment of the collision or accident, by first alleging that, although the deceased was the licensed master in charge of the "Iowa" on this trip of navigation over the Ohio and Mississippi Rivers, he was not a licensed pilot at that time for navigation on the Ohio River, and then undertakes to, and does, allege that at the particular time of the collision or accident the duly licensed pilot was operating and navigating said vessel, and specifically alleges that "he was not in charge of the actual operation, navigation and management of the said 'Iowa' on said date," and further alleges "that while said 'Iowa' was being navigated, used and controlled by the agents, servants and employes of said defendant, other than said John M.

Warner, to unground the said barges * * *, the said agents, servants and employes of the defendant, other than the said John M. Warner, and independently of him, and while said John M. Warner was not cognizant of exactly what was being done on all parts of said 'Iowa' * * * that at this time (the exact time of the collision) the said John M. Warner was attempting to save his own life and the lives of those on board of the said 'Iowa' and was attempting to save the property of the defendant from further injury."

It is apparent, therefore, that the petitioner was making a studious effort to bring herself within the provisions of section 33 after realizing the distinction made between a master and a seaman under provisions of this act. In her attempt to bring herself within the provisions of said section 33, she undertakes to allege the above additional facts which take her from under another essential provision of the act, namely, that it is not sufficient to allege and prove that the defendant, at the time of the accident or injury, was engaged in interstate commerce, but that the plaintiff, at the time of the accident or injury, was engaged in interstate commerce. By these allegations the petition fails to bring the deceased within this provision. There are no affirmative allegations to show in what capacity, if any, the deceased was employed at the particular time of the collision or accident, nor are there any affirmative allegations as to his duties at the particular time, but, on the contrary, the allegations negative the idea that the

deceased was, at that time, engaged in interstate commerce. Section 33, relied upon, provides "that any seaman who shall suffer personal injury in the course of his employment, may, at his election, maintain an action for damages." Nothing is here alleged to the effect that he was injured or killed while in the course of his employment at the particular time. Nothing is alleged as to the duties he was then performing under said employment. On the contrary, by negative allegations and by natural and justifiable inferences, the deceased at the time was not engaged in the course of his employment as captain or master of the vessel and, therefore, not engaged "in the course of his employment" in interstate commerce.

In deciding a case under the Federal Employers' Liability Act, the Supreme Court of South Carolina, in **Thornhill, Admx., v. Davis,** Director General, 113 S. E. 370, 24 A. L. R. 617, 625, held:

> "The contention that both the carrier and the employe must be engaged at the time of the injury in interstate commerce is supported by the decisions construing the following language of the Act, 'every common carrier by railroad, while engaged in commerce between any of the several states * * * shall be liable for any damages to any person suffering injury while he is employed by such carrier in such commerce.'"

The Supreme Court of Missouri, in a very similar case, Elliott v. Payne, 239 S. W. 851, 23 A. L. R. 706, held:

> "There is not a word of direct testimony as to why or for what purpose the deceased left his moving engine. The cases (both federal and state) all held that the burden is upon the plaintiff to show the servant was about the business of the master at the time of the injury. Without this pleading and proof there can be no recovery."

Also see Barry v. Hannibal and St. J. Railway Co., 98 Missouri, 62, 70.

While the remedial benefits of section 33 will be liberally construed so as to give effect to those who are entitled to enjoy the benefits thereunder, still the act will be strictly construed as to persons seeking this benefit in determining the persons or classes of persons who are entitled to its benefits, and the courts, by judicial interpretation, will not read into this Act of Congress the inclusion of persons or classes of persons not clearly intended by Congress to be included, which would thereby enlarge the class of persons entitled to the benefits. The question presented involves the construction and interpretation of an Act of Congress of the United States, namely, the Jones Amendment, June 5, 1920, to the Merchant Marine Act, being Section 33 of Chap. 250 of 41 St. at L., page 1007, and also Section 688 of Chap. 18, Title 46, of U. S. C. A. and of Mason's U. S. Code. The aforesaid amendment amended Chap. 18 of the Merchant Marine Act and is subtitled "Merchant Seamen." The purpose of the amendment was to make the Federal Employers' Liability Act applicable to seamen.

It is not a question whether Congress intended to exclude masters of vessels and their personal representative from the remedial benefits under section 33, but rather whether the courts can now read into the act that Congress intended to include masters of ships, under the provisions of this act wherein Congress refers only to "seamen," and wherein, under another section, Section 713 of Chap. 18, Title 46, U. S. C. A., and Mason's U. S. Code, entitled "Merchant Seamen," Congress specifically and separately defines the term "master," and then, by the conjunction "and," defines the term "seaman."

Since this action seeks to recover for the wrongful death of Captain Warner, and since such rights, purely statutory, are in derogation of the common law, the same must be strictly construed.

While the remedial benefits of the statute shall be liberally construed so as to give effect to those who are entitled to enjoy the benefits thereunder, still the act must be strictly construed as to the persons entitled to its benefits and as to conditions of employment to bring the person or the deceased within its provisions to enjoy said benefits.

The same general rules of construction apply to this phase of the Federal Employers' Liability Act, the Jones' Amendment (Section 33) to the Merchant Marine Act, as in the case of the construction of the Wrongful Death Statutes.

The Washington Supreme Court (in banc), in the case

of **Whittlesey et al. v. City of Seattle**, 163 Pac. 193, L. R. A. 1917 D 1084, held:

> "Some courts have held the Wrongful Death Act, which, in some form, is common to all the states (3 Shearm. & Redf. Neg., Appx., p. 2051 et seq.), to be in derogation of the common law, and therefore to be construed strictly. Others have held the act to be remedial, and have construed it liberally. But, having in mind our own decisions, we agree with Judge Cooley, who suggests the correct rule: 'That such statutes should receive a strict construction in determining the persons or classes of persons who are entitled to their benefit, and a liberal construction in applying the statute in their favor' (1 Cooley, Torts [3d ed.] 553),"

and therein further held:

> "That a statute giving a right of action that did not theretofore exist would not be extended by construction beyond the class or classes specifically mentioned therein."

The Supreme Court of Missouri, in Bates v. Sylvester, 205 Mo. 493, 506, in reaching its conclusion, interpreting and construing the Death Statute of Missouri, cited and approved the following:

> "This same question has received the consideration of the Supreme Court of Indiana in Hamilton v. Jones, 125 Ind. 176 (1890), and Mitchell, J., with great care and discrimination reviewed the cases of Hegerich v.

> Keddie, Yertore v. Wiswall, Cregin v. Railroad, Russell v. Sunbury, already noted, and Moe v. Smiley, 125 Pa. St. 136, and Ott v. Kaufman, 68 Md. 56, and disapproved Yertore v. Wiswall, as the Supreme Court of Ohio and the Court of Appeals of New York have, and reached the conclusion 'that statutes in derogation of the common law are to be strictly construed, and one who seeks to maintain an action which was within the prohibition of the common law must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by the statute must present a case clearly within the statute which creates the right. The language of section 284 seems to repel any implication that the personal representatives of one whose death has been caused by the wrongful act or neglect of another might maintain an action against the administrator or other personal representative of the wrongdoer.' "

To the same effect see **Troll v. Gas Light Company**, 182 Mo. App. 600, 604.

While not exactly in point, still there is some analogy between the construction of the Workmen's Compensation Statute and the construction of this act which may assist in determining this question.

In **Skouitchi v. Chic Cloak & Suit Company**, 230 N. Y. 296, 130 N. E. 299, 15 A. L. R. 1825, wherein the Court explains its former decision of Bowne v. S. W. Bowne Co., 221 N. Y. 28, 116 N. E. 364, wherein an action was brought by the president and principal stockholder of a corpora-

tion for damages growing out of personal injuries sustained, and the Court therein concluded: "We simply held that 'the higher executive officers of a corporation are not, as such, its employes in the ordinary use of the word' (221 N. Y. 30)."

In construing section 33, under which petitioner seeks to recover, the Supreme Court of Missouri considered Section 713, Title 46, U. S. C. A., and Mason's U. S. Code, wherein Congress defines certain terms as used in this chapter. Section 713 is entitled "Definitions, Schedule and Tables," and falls under the subdivision entitled "Definitions of Statutory Terms."

Under this section the terms "master," "seaman," "vessel" and "owner" are separately defined.

This section, without any other interpretation necessary, clearly distinguishes a "master" from a "seaman" as much as it does a "vessel" from the "owner" or the "master" from the "owner" or the "owner" from a "seaman," and specifically defines each one.

Congress clearly defines four terms, namely, master, seaman, vessel and owner. Where one is defined in one clause to the exclusion of the other, there is no necessity of again excluding the same from the other clause defining another classification. In the first clause Congress defines "master" to the exclusion of the other members of the crew, as one separate and distinct from the others. The master is distinctly defined as "having command of any vessel," and that such person "shall be deemed to

be the 'master.'" In other words, Congress defined him as a vice-principal in complete charge and command of the vessel and of the balance of the officers, men, etc., on board. He was thereby clearly distinguished and separated by distinction and classification, from the crew and from the term "seaman." That being true, there was no necessity of further excepting the master or classifying him in the second classification or clause. It is true, in the second classification, Congress excepted "apprentices," but these were not defined in any other part of this section. Had "apprentices" been separately defined, like "master," "owner" and "vessel," then Congress would not have made the exception under that clause.

Although the above is sufficiently conclusive and decisive, still we may approach the construction of this section (section 33) in the following manner, so as to distinctly show that the term "seaman," as used in said section, was not intended to include "masters," even though Congress had not, by statute, defined these terms.

The term "seamen" has been defined time and time again and in all definitions, where the term is used as set forth in the act under consideration, the "captain or master" is not included in the term "seamen" and the "master" is not termed a "seaman."

Starting with the English cases, we find laws similar to the act under consideration, wherein the terms shall be defined as above indicated.

In The Arina, 12 P. & D. 118, 123, the Court said:

> "By the interpretation clause of the Merchant Shipping Act 1854 (S2) the term 'seaman' is defined as follows: 'Seaman shall include every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.' "

And in Connor v. "Flora," 6 Can. Exch. 131, 132, the Court, in construing the Merchant Shipping Act and the Inland Water Seamen's Act, said:

> "The interpretation clause defines 'seamen' as every person employed or engaged in any capacity on board any ship, except masters or pilots."

The same definition is given by the Court in Corbett v. Pearce (1904), 2 K. B. L. T. Rep. (n. s.) 781, 20 T. L. R. 473, in construing the Employers' Liability Act and the Employers and Workmen Act.

Similarly we find that all persons employed in the navigation of a ship or upon a voyage other than master or mate, are to be deemed seamen within the provisions of the Civil Code of California 1903, Sec. 2049.

The various dictionaries define the term as follows:

> Century Dictionary: "A man whose occupation it is to co-operate in the navigation of a ship at sea; a mariner; a sailor; applied to both officers and com-

mon sailors, but technically restricted to men below the rank of officer."

Black's Law Dictionary: "Sailors; mariners; persons whose business is navigating ships, commonly exclusive of the officers of a ship."

In 35 Cyc, at pages 1178, 1179, 1180 and 1181, "seamen" is defined:

> "A seaman is defined to be one whose occupation is to assist in the management of ships at sea; a mariner; a sailor. The term is exceedingly broad in its signification and is held to include carpenters, clerks, cooks, coopers, deckhands, divers, engineers, firemen, fishermen, mates, pilots, porters, pursers, sailsmen, sealers, slaves hired as seamen, stewards and wreckers. It does not include, however, lightermen plying within a harbor on a vessel under twenty tons burden, nor does it include masters, musicians, raftsmen, or the servants of the master."

And the term "crew" is then defined:

> "The crew of a vessel in a general sense comprises all persons who in pursuance of some contract or arrangement with the owner or master are on board the same, aiding in the navigation thereof. The term includes the cook, the mate, and the engineer, but the bookkeeper of a steamboat, who performs such service wholly on shore and renders no service on board the boat, and is generally held to exclude the master, who is held to be rather in the nature of the owner than a seaman."

It has been repeatedly held that a master is not a seaman in the matter of admiralty liens for wages as is given to seamen.

In the M. Vandercook, 24 Fed. 472, 475, the Court said:

> "I am of the opinion that, under the circumstances of the case, the libelant must be treated as the master, and that his claim for wages is not an admiralty lien."

In the case of The Marie, 49 Fed. 287, in determining the right of wages due from a vessel owned by a foreign country, the Court said:

> "By the treaty the consuls of either nation have a right to sit as judges and arbitrators in such differences as may arise between the captains and crews of vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities.
>
> "The words 'crews of the vessels,' as here used, include all of the ship's company—all the seamen and officers, except the captain."

The Court, in Gonzales v. U. S. Shipping Board etc., 3 Fed. (2d) 168, construing and defining the terms "seamen" and "vessel," said:

> "The same section of the statutes above referred to, Section 8392 of the Compiled Statutes, that defines a 'seaman' defines the term 'vessel.' As we have seen, a 'seaman' is one employed on a 'vessel.' And this section says: 'A "vessel" shall be understood to com-

prehend every description of vessel navigating on any sea or channel, lake or river.' The Standard Dictionary defines a 'seaman' as: 'One not an officer who takes part in the practical navigation of a vessel—a sailor.' It defines a 'sailor' as 'one whose occupation is to aid in navigating a vessel, especially one of the crew.' ''

In The Atlantic, 53 Fed. 607, 608, the Court said:

"It is a puzzling question whether libelant stood in the place of the master or not. He was employed by respondent, looked to him for his wages, was paid by him, was under the control of no one but him, and in these respects came within many of the reasons given for refusing the master his lien (Drinkwater v. The Spartan, 1 Ware 158; The Eolian, 1 Biss. 321). On the other hand, he had none of the responsibility or power of a master, never had any independent authority, did not get continuous wages, but was paid only when his engine was at work. Upon the whole, I am of the opinion that he cannot be treated as a master of a vessel. He was master in no maritime sense. He was employed because he was an engineer, and his chief duties were to run the engine. For this reason his pay ceased when his engine stopped. His position on this dredge was analogous to that of a sailing master on a yacht, and it has been held that he is not a master."

It is true that where there is nothing in the context or statute to define or show the sense in which the word is used the term "seaman" has been held to include "mas-

ter," such as the right to become citizens, to make nuncupative or unwritten wills, and in certain criminal cases, but in none of these cases is the question of negligence charged to an inferior officer or sailor who is under the direct orders and command of the master, nor does any of these cases involve the control of the vessel which is under the direct charge of the master. Not one of these cases has to do with an act of Congress where the terms "master" and "seaman" are defined.

But it must also be remembered that in construing this act we must keep in mind the general law of master and servant, to the effect that the master is not liable for any injury to the superior resulting from the negligence of his subordinate.

In McGrory v. Ultima Thule A. & M. R. Co. (Ark.), 118 S. W. 710, 23 L. R. A. (n. s.) 301, 303, which was an action for damages by the superintendent, the Court said:

> "According to the undisputed facts the plaintiff was a vice-principal of the defendant at the time of the injury, and the negligence of the employe, if any, which caused the injury, was that of one of his subordinates. Is the master responsible to a vice-principal on account of the negligence of another of its servants, who is a subordinate of the vice-principal and under the latter's control? It is plain that the master is not responsible, for that is one of the ordinary risks which the servant assumes when he takes service and assumes control over his subordinates. The master is not bound, under the doctrine of

respondeat superior, to indemnify one servant for an injury caused by the negligence of another servant in the same common employment, unless the negligent servant is at the time acting as the master's representative; in other words, the vice-principal of the master (2 Labatt, Mast. & S., Sec. 470; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397). The subordinates of the vice-principal, over whom he exercises control, are his fellow servants in a common employment, so far as the responsibility of the master to him for their acts is concerned, and the master discharges his full duty to his vice-principal by exercising ordinary care in selecting competent subordinate servants."

This superiority is more pronounced in the matter of navigation, because the captain or master of a vessel has control of every department of service on board, and it is his duty personally to see to the course of his vessel, and to see that the officers and crew under him properly perform their assigned duties in respect to the navigation of the vessel, even in local waters where the vessel, for the time being, is in charge of a local pilot, and if there is any misconduct or neglect he is responsible civilly (36 Cyc 132).

To show some of the duties and responsibilities of the master of a vessel we quote from Union Insurance Co. v. Dexter, 52 Fed. 152, 153, 155:

"Upon the hearing of the present case the facts proved are substantially the same as before, except that it does not appear that at 5 p. m., before the

stranding, the position of the steamer was accurately ascertained. The master now testifies, on the contrary, that he had not obtained any accurate observation since the previous noon. The additional testimony taken in behalf of the respondent shows in general the dangerous nature of the coast; that a prudent navigator, in going on the westward side of Old Providence Island in the nighttime, would intend to give it a berth of about six miles, which the respondent testifies he also intended; that the haziness of the atmosphere at that time made the estimate of the distance of land deceptive; that the currents of that region, depending upon the strength of the wind, usually run about north or northwest, varying from half a knot to two knots, or sometimes even more, and that up to the line of the coral reefs the water is so deep as to make soundings for the most part impracticable."

In that case the Court held:

"I must hold the master remiss in his duty, both for not taking a course more to port, which a proper consultation of his chart would have shown to be necessary on his own estimate of his position, and also for not correcting his erroneous estimate of position by observations with the alidade. For losses resulting from such neglect, either to ship or cargo, the master is directly responsible to the persons injured and to the libelant by subrogation on its payment of the insurance (Story, Ag., par. 314, 315)."

The Supreme Court of Missouri, therefore, correctly interpreted and construed said Act of Congress in accord-

ance with the well-known rules of construction, in accordance with accepted definitions of the terms "master" and "seamen" as used in the Merchant Marine Act, as defined by our courts, by legal text-writers, by standard dictionaries, and as defined by Congress in section 713 of the same chapter (Section 713, Title 46, Chap. 18, U. S. C. A., and Mason's U. S. Code), and correctly held and decided that the "master" of a vessel cannot be included in the term "seamen" as used in section 33 (Section 688, Title 46, Chap. 18, U. S. C. A., and Mason's Code).

Petitioner herein, in opposition to said decision of the Supreme Court of Missouri, can get little or no comfort by the process of reasoning adopted in quoting Section 20 of the so-called La Follette Seaman's Act, and the case of Chelentis v. Luckenbach Steamship Company, 247 U. S. 372, 384, 385, 62 L. Ed. 1171, 1177, nor in her claim that, although the above referred to section 713, wherein Congress defines certain terms, is part of the same title and the same chapter in the U. S. C. A. and in the Mason's U. S. Code, is derived from and based upon Section 65 of the Act of June 7, 1872 (C. 322, s. 65, 17 Stat. 277).

We cannot agree with the petitioner that the language of section 65 is so materially different from section 713 as to constitute any material variance. On the contrary, the definitions and the manner of defining the various terms are identical.

The Chelentis case cited, supra, was not an action by the captain or master, nor did it involve the right of a

master to recover. The action was by a fisherman, instituted as a common-law action for personal injury damages based upon an alleged improvident order of his superior officer, as distinguished from an admiralty action for care, maintenance and loss of wages. The Court denied the relief because

> "Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

Assuming that the Senate committee's attention had been directed to this case, it could only be for the purpose of giving common-law relief to the employes or seamen, and had no bearing on the question of differentiating between the commanding officer or master and his seamen.

Neither can petitioner hope to receive comfort out of the case of **International Stevedoring Co. v. Haverty**, 272 U. S. 50, 52, 71 L. Ed. 157, 160, for the purpose of showing that the Court considered the term "seamen" flexible enough to include stevedores, and, therefore, we should extend the flexibility, in this instance under section 33, so as to extend it to include the term "master" under the term "seamen." Cases of a similar import are cited by petitioner for the same purpose. However, an examination of these cases disclosed the Court's reasoning. In the International Stevedoring case, supra, the Court gave its reasons for so extending the term by showing that the steve-

dore in that case was, at the time, performing duties formerly performed by the ship's crew or seamen, and since they were now performing the same kind of work they should be entitled to the same protection and to the same remedies.

The petitioner also cites and quotes from In re Scott, 250 Fed. 647, which case is based upon a declaration of a foreigner, a master, to become a citizen of the United States under the Naturalization Act provided for seamen, as foreigners, to become citizens. Clearly the construction of such an act would not be like the one under consideration. As previously pointed out, there are instances where the term "seamen" is broad enough to cover masters, namely, in matters of naturalization, protection against criminal and felonious assault, matters relative to certain military duties, pertaining to care, maintenance and loss of wages while upon the high seas, and matters going to the validity of nuncupative or unwritten wills. The Court, however, in the above Scott case, recognized the distinction by the following language:

> "It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context."

We are not unmindful of the fact that Congress, in Section 33, gave to a class, seamen, employes, and members of the crew, a right or remedy not enjoyed at common law, and, furthermore, Congress, in view of this granted remedy, specifically defined the terms therein used.

The petitioner entirely overlooks the real purpose of the Act as being that to protect the men or the employes, and not the chief executive officer, the commander or the master, who stands in the position as a vice principal. In considering the cases cited by petitioner to substantiate the position that our Courts have construed the term "seamen" to include "master," we must keep in mind the nature of the causes of actions decided by the Courts as compared with the nature of petitioner's cause of action, which is based upon allegations of negligence and upon the theory of recovery for personal injuries or death resulting through the carelessness and negligence of the respondent's servants who are directly under and subject to the direct orders of the master of the vessel as a vice principal.

The Balsa, 10 Fed. (2d) 408, cited by petitioner, was not one growing out of common-law negligence, nor did it involve the construction of statutory law, but was one in admiralty, for the recovery of the costs of cure and maintenance.

Before giving weight, as petitioner does, to the quotation from Nogueria v. N. Y. N. H. & H. R. Co., 32 Fed. (2d) 179, and 281 U. S. 128, 74 L. Ed. 754, we must ascertain what facts were before the Second Circuit Court of Appeals and the Supreme Court of the United States, and what question was to be determined. Neither court was called upon to determine whether the term "seamen" included "master", and neither so decided. That was an action by a freight handler and the question arose whether his remedy was under the "Jones Amendment" or under

the Longshoremen's and Harbor Workers' Compensation Act. Nor is the petitioner justified in inferring that this Court thereby inferred that the "master" had his remedy under the so-called Jones Act or Jones Amendment (Section 33).

There is no dispute and there is no question but that this petitioner had a remedy for the death of her husband, if the facts justify the same, but she has elected the wrong remedy and cannot maintain this action under this section.

Without reviewing each of the various cases cited by the petitioner, we may state that those above referred to fairly well disclose the trend of all that have or can be cited.

We again repeat that the petitioner has failed to show wherein the Supreme Court of Missouri is in error in holding that this petitioner is not entitled to recover in this action, and we again affirm that the writ should be denied.

The Supreme Court of Missouri correctly held and decided that under the general rule in construing statutes or constitutions, the Court may resort to extraneous matters to aid in arriving at a correct interpretation when, and only when, the meaning of the words used is ambiguous or uncertain, but the words used under the Act now being considered are not ambiguous or uncertain.

In view of that conclusion the Supreme Court refused to consider the matters referred to by the petitioner herein in her brief under subdivision (A) on page 13 of her brief, referred to as United States Senate hearings on the establishment of a Merchant Marine, pp. 1628, 1709 and 1712.

Even though the Supreme Court of Missouri had been inclined to have considered such extraneous matters as above referred to, it could not have sustained the petitioner's position and would not have been justified in construing section 33 to mean that the term "seaman" included the term "master."

The Senate hearings, 1919-1920, were before its Committee on Commerce under the general subject "Merchant Marine" and are contained in part II, Vol. 143, consisting of 2,089 pages, and cover the entire subject of merchant marine for the purpose of gathering facts regarding the shipping situation for the purpose of establishing an American merchant marine.

There appeared before this committee the American Manufacturers' Export Association, ship builders, exporters, brokers, agents for steamship lines, National Association of Masters, Mates and Pilots, the International Seamen's Union of America and other interested individuals and organizations. Each organization furnished facts concerning the members of the particular organization. By way of example, the Association of Masters furnished evidence as to the masters, mates and pilots, while the Seamen's Union furnished facts concerning the welfare of the employes or seamen.

It will become apparent upon reading all of these proceedings that, on all occasions, there was a clear distinction drawn between the master and the officers of a vessel and the employes, seamen, or crew.

By way of illustration, we quote from the testimony of Captain Abernathy, page 674 of said record, as follows:

> "The Chairman: Will you state right there, as a master, what the ordinary work is of seamen on steamers?
>
> Captain Abernathy: Simply to keep the vessel up, keep the ship clean, keep the cargo gear in order—that is all. On the Atlantic Coast the sailors do not work freight; have nothing to do with the freight; simply to keep the ship in order."

At page 676 Captain Abernathy testified:

> "The Chairman: The men down in the fire room, engine room, etc., are not seamen?
>
> Captain Abernathy: No, sir.
>
> The Chairman: They are not classed as seamen?
>
> Captain Abernathy: They are seamen under the law, but they are different from the deck crew. We call the deck crew seamen. Within the meaning of the law everyone goes to sea outside of the master is a seaman.
>
> The Chairman: That is what I want to get, under the meaning of the law how many are there on your cargo ship?"

Petitioner herein, apparently, undertakes to rely entirely upon the testimony of one witness before said committee, Mr. Furuseth, who was a member of, and testified in behalf of, the International Seamen's Union of America. By examining his testimony we find that he testified, at page 1712, as follows:

"Senator Fletcher: In other words, under the common law, if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy?

Mr. Furuseth: He would have no remedy.

Senator Fletcher: And now you want to change that so that he could have a remedy, provided his own negligence did not bring about the injury?

Mr. Furuseth: That is it, exactly."

Other citations of a similar character could be given from this record, but this is sufficient to show that the Supreme Court of Missouri could have got very little comfort in trying to determine that Congress intended to include masters under the term "seamen."

CONCLUSION.

Since the Supreme Court of Missouri has properly and correctly held and decided that this petitioner is not entitled to recover under her second amended petition, filed as the basis of her cause of action, and since the Supreme Court has properly and correctly held and decided that a master is not a seaman, under the provisions of said section 33, and since the terms and language of said section 33 are clear, certain and unambiguous, there is no necessity for a review of this case by this Court, and, therefore, the writ of certiorari should be denied.

JOSEPH T. DAVIS,
Counsel for Respondent.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 870

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),

vs.

EDWARD F. GOLTRA, Doing Business Under the Style and Name of THE GOLTRA BARGE LINE,
Respondent.

BRIEF OF RESPONDENT ON THE MERITS.

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Respondent.

BRIEF OF RESPONDENT ON THE MERITS.

STATEMENT OF THE CASE.

Since the question raised on a general demurrer to petitioner's second amended petition in the Circuit Court of the City of St. Louis, Missouri, and similarly raised in the Supreme Court of Missouri, was based upon the proposition:

> "Plaintiff's second amended petition does not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act, as same is made applicable to 'seamen' under the Jones Amendment (June 5, 1920) to the Merchant Marine Act, and, therefore, is not entitled to recover thereunder,"

it becomes necessary to state the facts alleged in the second amended petition.

This petition alleges that in May, 1926, defendant was operating boats and barges on the Ohio and Mississippi Rivers, carrying freight in interstate commerce; that deceased was employed and was serving in the capacity "of captain or master," "to do all things which are required by custom and law of the duly licensed captain or master of the 'Iowa' "; that the presence of deceased on the "Iowa" in the capacity of captain or master was required by Section 222, Title 46, of Mason's U. S. Code Annotated 1926, which, in part, provides:

> "No vessel of the United States subject to the provisions of this chapter, or chapters 14 and 15, or to the Inspection Laws of the United States, shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew, including certified lifeboat men, separately stated," etc.

That deceased, although licensed and authorized as a captain and master, had no license or authority to act as pilot on said "Iowa" while it was being so operated.

That defendant, in compliance with section 222 of title 46, etc., employed a licensed pilot.

That, although deceased was on board and was acting in the course of his employment and scope of his duties as captain or master, he was not acting as pilot.

That while the "Iowa" was towing an interstate shipment from a point in Pennsylvania to a point in Louisiana, the water was low in the Ohio River, and, as a result thereof, certain barges in the tow grounded in the Ohio River near Stevensport, Kentucky; that the "Iowa" was used and navigated to remove the barges from the ground or sandbar, and the said "Iowa" was so carelessly, negligently, recklessly and unskillfully handled, used, controlled, operated and navigated that they (the agents, servants and employes of the defendant) caused said "Iowa" to collide forcibly and violently with the said barges and the bank of the Ohio River; that at the time said deceased was attempting to save his own life and the lives of others and attempting to save the property of defendant he was thrown into the river and drowned.

Upon these facts the Supreme Court of Missouri (Warner v. Goltra, 67 S. W. [2d] 47, 49) concluded:

> "We do not believe that the master can be considered a seaman within the purview of sections 688 and 713 (46 U. S. C. A.), supra; the trial court properly sustained the demurrer to appellant's petition."

SUMMARY OF POINTS AND AUTHORITIES.

Petitioner's second amended petition, filed in the Circuit Court of the City of St. Louis, Missouri, does not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act, as that act is made applicable to "seamen" under Section 33 (Jones Amendment, June 5, 1920) of the Merchant Marine Act (S. 688, C. 18, Title 46, U. S. C. A., C. 250, S. 33, 41 Stat. 1007).

I.

The term "seaman" as used in Section 33 (Jones Amendment, June 5, 1920) of the Merchant Marine Act (46 U. S. C. 688) does not include the term "master" so as to make the Federal Employers' Liability Act applicable to masters of ships or vessels the same as it applies to seamen and to employes of railroads in an action by the personal representative of a deceased master to recover damages for the wrongful death of the master of a vessel.

A. Congress has defined the terms "master" and "seamen" as intended in this act, and from a consideration of the other acts of Congress relating to the same subject matter it is manifest that Congress clearly and definitely indicated the intention to differentiate between master and seamen.

Section 713, Chap. 18, Title 46, U. S. C. A.;
Sections 561-579, C. 18, Title 46, U. S. C. A.;

Sections 591-605, C. 18, Title 46, U. S. C. A.;
Sections 641-646, C. 18, Title 46, U. S. C. A.;
Sections 651-688, C. 18, Title 46, U. S. C. A.;
Sections 701-713, C. 18, Title 46, U. S. C. A.;
Section 222, Title 46, U. S. C. A.—Section 4463, R. S.;
Section 375, Title 46, U. S. C. A.;
Buffalo & Grand Island Ferry Co. v. Williams, 25 Fed. (2d) 612;
United States v. Lingren, 28 Fed. (2d) 725;
Rules and Regulations, Steamboat Inspection Service, by United States Department of Commerce.

B. Construction of the terms used in Section 33 of the Merchant Marine Act in relation to other laws and decisions of the Court in connection therewith clearly indicates that Congress did not intend to include the master in the term "seamen" for right of recovery in an action for damages as here presented.

The Arina, 12 P. & D. 118, 123;
Connor v. Flora, 6 Can. Exch. 131, 132;
Corbett v. Pearce (1904), 2 K. B. L. T. Rep. (n. s.) 781, 20 T. L. R. 473;
The M. Vandercook, 24 Fed. 472, 475;
The Marie, 49 Fed. 287;
Gonzales v. U. S. Shipping Board, etc., 3 Fed. (2d) 168;
The Atlantic, 53 Fed. 607, 608;
Robinson v. Baltimore & O. R. Co., 237 U. S. 89, 59 L. Ed. 849;
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Morrow v. Asher, 55 Fed. (2d) 365, 367;
Braeuel v. Ruether, 270 Mo. 603, 193 S. W. 283, 285, L. R. A. 1918 A 444;
American Asphalt Roof Corp. v. Trimble et al. (Mo. Sup. Ct.), 44 S. W. (2d) 1103, 1105;
Wilhelm v. Hersh (St. L. Mo. A.), 50 S. W. (2d) 735;
Lepard v. Michigan C. R. Co., 166 Mich. 373, 130 N. W. 688, 40 L. R. A. (n. s.) 1105;
Chase v. Erhardt (Dist. Ct.), 198 Fed. 305, 310;
Civil Code of California 1903, Sec. 2049.

C. Construction of the terms used in Section 33 of the Merchant Marine Act in relation to the circumstances attending the passage of the act and the object to be secured leads to the conclusion that Congress did not intend to include the master within the term "seamen" in an action of the nature under consideration.

Proceedings before the Committee of Commerce of the United States Senate on the subject of Merchant Marine, Part II, Vol. 143, pages 674, 1628, 1633, 1638, 1639, 1641, 1643, 1644, 1645, 1656, 1679;
Chelentis v. Lukenbach Steamship Co., 247 U. S. 372.

D. Construction of the terms of Section 33 of the Merchant Marine Act under the rule of interpreting same in the common-sense use of the terms, leads to the same aforementioned conclusion.

Century Dictionary, "Seaman";
Black's Law Dictionary, "Seaman";
The Marie, 49 Fed. 287;
Gonzales v. U. S. Shipping Board, etc., 3 Fed. (2d) 168.

E. Although a pilot is temporarily in charge of a vessel, the master of that vessel is not absolved and the vessel is still under command of the master; the master cannot be construed to be a seaman under Section 33 of the Merchant Marine Act by alleging that he was temporarily away from his post of duty.

The Oregon, 158 U. S. 186, 39 L. Ed. 943;
The Betavier, 1 Spinks, Eccl. 378, 383;
The John A. Morgan-Grinnell v. The John A. Morgan, 28 Fed. 895, 896;
White v. McDonough, 29 Fed. Cas. No. 17,552;
Dorrell v. Schwerman, 111 Fed. 209.

II.

Even though the master may be classified under the term "seamen" as used in Section 33 of the Merchant Marine Act, the petitioner has failed, herein, to state a cause of action in that she fails to allege that the deceased,

at the time of the injury or death, was engaged in interstate commerce, as is required under the Federal Employers' Liability Act.

Thornhill, Admx., v. Davis, Director General (S. C.), 113 S. E. 370, 24 A. L. R. 617, 625;
Elliott v. Payne (Mo.), 239 S. W. 851, 23 A. L. R. 706;
Barry v. Hannibal & St. J. Ry. Co., 98 Mo. 62, 70.

ARGUMENT.

Petitioner's second amended petition, filed in the Circuit Court of the City of St. Louis, Missouri, does not state facts sufficient to constitute a cause of action under the Federal Employers' Liability Act, as that act is made applicable to "seamen" under Section 33 (Jones Amendment, June 5, 1920) of the Merchant Marine Act (S. 688, C. 18, Title 46, U. S. C.; C. 250, S. 33, 41 Stat. 1007).

I.

The first question presented may be more correctly stated:

Does the term "seamen," as used in Section 33 (Jones Amendment, June 5, 1920) **of the Merchant Marine Act** (46 U. S. C. 688), **include the term "master," so as to make the Federal Employers' Liability Act applicable to masters of ships or vessels the same as it applies to seamen and to employes of railroad?**

The question presented by petitioner in her brief assumes that the master of the vessel was killed as the result of the negligence of the respondent herein.

It cannot be stated, as petitioner seems to argue, in this manner: Did Congress intend to **exclude** masters of vessels and their personal representatives from the remedial benefits of section 33? On the contrary, it may be more appropriately asked whether the courts will go beyond the purview of the act and judicially enlarge it to

include master, especially in face of the definitions in Section 713, U. S. C., Title 46.

Petitioner, as the personal representative, seeks to recover damages for the wrongful death of her husband, who at the time of his death was the master and in complete charge of the boat or vessel on the Ohio River. The action is brought under Section 33 (Jones Amendment, June 5, 1920) of the Merchant Marine Act (Sec. 688, U. S. C., Title 46). The act is set forth on page 4 of petitioner's brief and will not be repeated here.

As the act makes no distinction between vessels on the high seas and those on inland waterways, the construction of its terms must be the same as if the present question arose by acts on the high seas.

Respondent contends that the language of the act under consideration and the terms used therein are clear and unambiguous except in so far as petitioner undertakes to bring herself within its terms.

Since this question is raised, however, by her petition, the first consideration is that of determining the intention of Congress by the statutory definitions.

A. Congress has defined the terms "master" and "seamen" as intended in this act, and from a consideration of the other acts of Congress relating to the same subject matter it is manifest that Congress clearly and definitely indicated the intention to differentiate between master and seamen.

Congress, in the Act, June, 1926, to consolidate, codify and set forth the general and permanent laws of the United States in force December 7, 1925, designated the same as "The Code of Laws of the United States of America," and therein provided that said code may be cited as the "U. S. C."

In its codification or restatement of the laws, it entitled title 46 as "Shipping," and chapter 18 thereunder as "Merchant Seamen."

Under this chapter 18 of title 46 were placed all the laws pertaining to "Merchant Seamen," and the sections are numbered from section 541 to section 713, inclusive. Sections 688, "Recovery for injury to or death of seamen," and 713, "Definitions, schedule and tables," became a part of this chapter and title.

The context of the chapter and title demonstrates the legislative intent, without resorting to extraneous matters or other rules of statutory construction, to be that there is a distinction made in the use of the terms "Master" and "Seamen."

For the purposes herein it will be unnecessary to specifically direct attention to each of said sections, but a reference to some will be helpful.

For specific examples we call attention to: Sections 561 to 579, under subtitle "Shipment of Crew," prescribing the duties of the master and the rights of seamen separately, as is illustrated by the language used in section 563 to the effect that the shipping agreement shall be regarded as if same had been entered into between the master of a vessel and a seaman; in section 564 it is provided that "The master of every vessel * * * shall, before he proceeds on such voyage, make an agreement, in writing * * * with every seaman whom he carries to sea as one of the crew"; in section 568 penalties are imposed upon the vessel, "If any master, mate or other officer * * * receives * * * to be entered on board of any merchant vessel any seaman who has been engaged"; in section 570 it is provided "Every master of a merchant vessel who engages any seaman," with practically the same language in section 571. In sections 591 to 605, under title "Wages of Seamen," even a greater distinction is made, because the master here is regarded virtually as the vice-principal with the owner in making proper provisions for the payment of wages to seamen; in sections 621 to 628, entitled "Effects of deceased seaman," specific duties of the master are set forth in these sections as relate to the seamen employed by the master as may be illustrated in the following quotation from section 625: "When-

ever any seaman or apprentice dies in the United States and is, at the time of his death, entitled to claim from the master or owner of any vessel in which he has served." The same distinction is made under sections 641 to 646, under the title "Discharge," wherein the conditions are set forth under which the master may discharge any seaman in his employ. Sections 651 to 688, inclusive, are under the title "Protection and relief," and therein places certain duties and responsibilities upon the master and owner as to the seaworthiness of the vessel, as well as that of providing for other protection and relief, including section 688, entitled "Recovery for injury to or death of seaman." Under the last-named subtitle we call specific attention to section 658, relative to "Discharge of crew on account of unseaworthiness," wherein it is provided "And the master shall, in a reasonable time, remove or remedy the causes of complaint, then the crew shall remain and discharge their duty," and in section 660, "Every master who refuses to pay such wages and charges shall be liable to each person injured thereby in damages"; in section 664 it is provided that "If any seaman, while on board any vessel, shall state to the master that they desire to make complaint." We call specific attention to section 672, entitled "Requirements, qualifications and regulations as to crews," wherein the specific qualifications of seamen are set forth as distinguished from masters and officers wherein the act provides "Every person shall be rated an able seaman and qualified for

service as such on the seas who is nineteen years of age or upward, or has had at least three years service on deck at sea or on the Great Lakes," and also section 673, which provides that "These provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel." Also section 685, wherein "He (consul) shall require the master to pay to such seamen one month's wages over and above the wages due at the time of discharge." Section 688, under consideration in the instant case, is a part of the latter subdivision. In sections 701 to 713, inclusive, under the subtitle "Offenses and Punishments," we find the same distinctions made between master and seamen, and it is under this classification that we find section 713, entitled "Definitions, Schedule and Tables."

Congress, under Section 713 of Chapter 18, Title 46, entitled "Merchant Seamen," defines the term "master" and then, by the conjunction "and," defines the term "seamen."

The terms "master," "seaman", "vessel" and "owner," as used in said section 713, are clearly defined. This section is indexed as "Seaman"—"Definitions of Statutory Terms," and reads as follows:

> "713. **Definitions, schedule and tables.** In the construction of this chapter, **every person having the**

> **command of any vessel** belonging to any citizen of the United States **shall be deemed to be the 'master'** thereof; and **every person** (apprentices excepted) **who shall be employed or engaged** to serve in any capacity on board the same **shall be deemed and taken to be a 'seaman'**; and the term **'vessel'** shall be understood to comprehend **every description of vessel** navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term **'owner'** shall be taken and understood to comprehend **all the several persons**, if more than one, **to whom the vessel shall belong.''**

This section, in defining these terms, clearly distinguishes a ''master'' from a ''seaman'' as much as it does a ''vessel'' from the ''owner,'' or the ''master'' from the ''owner,'' or the ''owner'' from a ''seaman,'' and defines each one.

Congress by its statutory definitions defines, separately, the ''master'' as a person having the command of the vessel, the ''seaman'' as a person (''apprentices excepted'') who is employed or engaged to serve in any capacity on board the vessel, and the ''owner'' as the person to whom the vessel belongs.

The petitioner undertakes to interpret what Congress clearly defines and clings to the idea of exclusion rather than inclusion. In so doing petitioner magnifies the second clause in section 713 and thereby detracts from the context of the whole. Congress clearly defines four terms, namely, ''master'' **and** ''seaman'' **and** ''vessel'' **and**

"owner." Naturally, where one is defined in one clause to the exclusion of the other, there is no necessity of again excluding the other. In the first clause Congress defines "master" to the exclusion of the other members of the crew, as one separate and distinct from the others. The "master" is definitely defined as "having **command** of any vessel" and that such person shall be deemed to be the "master." In other words, Congress defined the master as a vice-principal in complete charge and command of the vessel and the balance of the officers and crew on board. The master was thereby clearly distinguished and separated, by definition and this classification, from the crew and from the term "seaman." That being true, there was no necessity of further excepting the master or again classifying the master in the second classification. It is true, in the second classification Congress excepted "apprentices," but apprentices are not defined in any other part of this section. Had apprentices been separately defined, like "master," "owner" and "vessel," then Congress would not have made this exception as to apprentices.

Under these statutory definitions it is clear that the term "seaman" as used in section 688 does not include the "master."

The above section 713 also contains as a part of said section the "Schedule," which is the form of articles of agreement, wherein there is a further distinction made between the master and the seamen—for instance, "It is agreed between the master and seamen or mariners of the

....., of which ..... is at present master," * * * "and the said crew agree to conduct themselves in an orderly, faithful, honest and sober manner, and to be at all times diligent in their respective duties and to be obedient to the commands of said master."

The foregoing section 713 has been recognized by the federal courts as a statute of statutory definitions under chapter 18, "Merchant Seamen," and under title 46 as applicable to the definition for the term "seaman."

> Buffalo & Grand Island Ferry Co. v. Williams (2nd C. C. A.), 25 Fed. (2d) 612, 613;
> United States v. Lingren (4th C. C. A.), 28 Fed. (2d) 725.

The petitioner in her petition as the basis of her cause of action makes the identical distinction between "master" and "seaman" by alleging therein:

> "Plaintiff further states that the presence of said John M. Warner on board the said 'Iowa' on said May 11, 1926, in the capacity of captain or master, was required by Section 222, Title 46 of Mason's U. S. Code Annotated 1926, which, in part, provides as follows:
>
> " 'No vessel of the United States subject to the provision of this chapter or chapters 14 and 15 or to the Inspection Laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew, including certified lifeboat men, separately stated as may in the judgment of the local inspectors, who inspect the vessel, be necessary for her safe navigation.'

> "And by the rules and regulations of the Steamboat Inspection Service of the Department of Commerce, which rules and regulations are by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926, given the force and effect of laws."

The very section pleaded by this petitioner, Section 222, Title 46, Mason's U. S. Code, or Section 4463, R. S., only partially quoted in the petition, also provides:

> "If any such vessel is deprived of the services of any number of the crew, including certified lifeboat men, separately stated, without the consent, **fault or collusion of the master, owner or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master,** she is sufficiently manned for such voyage; provided, **that the master shall ship** if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty."

Under "Steamboat Inspection Service of the Department of Commerce Rules and Regulations" which are by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926, given the force and effect of laws, pleaded by the petitioner as part of her cause of action, also makes a clear distinction between "master" and "seamen." For instance, under Section 28 of Rule V, entitled, "Masters of River Steamers," the board of supervising inspectors set forth the form of examination required of a master, and provides "no license as master shall be issued to any

applicant who cannot read and write, and who has not served at least one year as a licensed mate or pilot of steam vessels, and then sets forth that the line of examination to be pursued by the inspectors in examining applicants for original license as master of river steamers shall cover ten specific subjects among which are: "4. As to his knowledge of proper management of vessel and crew in case of collision." "5. As to executive ability generally to manage officers and crew."

The inevitable conclusion from the context of the Acts of Congress relating to the general subject, "Merchant Seamen," as well as the context of the Act of Congress and the Steamboat Inspection Service of the Department of Commerce, rules and regulations pleaded and relied upon by the petitioner in the statement of her cause of action and the statutory definitions contained in Section 713, is that it was not the intention of Congress to include the term "master" in the term "seamen" as used in Section 688.

In view of the foregoing it is contended that the Supreme Court of Missouri, in the instant case, Warner v. Goltra, 69 S. W. (2d) 47, 49, correctly concluded as follows:

"We do not believe that the master can be considered a seaman within the purview of Sections 688 and 713 (46 U. S. C. A.), supra; the trial court properly sustained the demurrer to appellant's petition."

B. **Construction of the terms used in Section 33 of the Merchant Marine Act in relation to other laws and decisions of Court in connection therewith.**

It is conceded that prior to the enactment of the Merchant Marine Act and Section 33 thereof, a seaman was without a remedy against the vessel or its owners for injuries to his person, suffered in line of service under the general maritime law, or at common law, and the personal representatives were without remedy for the death of a person killed as a result of negligence while employed and engaged as a seaman upon a vessel, with the exception of cases resulting from the unseaworthiness of the vessel, or for breach of duty to provide the seaman with maintenance and cure.

In connection with the foregoing statutory definitions of "seaman" and "master," it is well to determine the legal construction placed upon these terms prior and subsequent to the enactment of this law.

An examination of the authorities dealing with the term "seamen" in relatively the same conditions as this term is used in Section 33 of the Merchant Marine Act will disclose that the term "master" is not included in the term "seamen" and that the master is not regarded as a seaman for such purposes.

Starting with the English cases, we find laws similar to the statute under consideration, wherein the terms are defined as above indicated.

In The Arina, 12 P. & D. 118, 123, the Court said:

> "By the interpretation clause of the **Merchant Shipping Act**, 1854 (82), the term 'seaman' is defined as follows: 'Seaman shall include every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.'"

And in Connor v. "Flora," 6 Can. Exch. 131, 132, the Court, in construing the **Merchant Shipping Act** and **the Inland Water Seamen's Act**, said:

> "The interpretation clause defines 'seamen' as every person employed or engaged in any capacity on board any ship, except masters or pilots."

The same definition is given by the Court in Corbett v. Pearce (1904), 2 K. B. L. T. Rep. (n. s.) 781, 20 T. L. R. 473, in construing the **Employer's Liability Act** and the Employers and Workmen Act.

Similarly we find that all persons employed in the navigation of a ship or upon a voyage **other than master or mate,** are to be deemed seamen within the provisions of the Civil Code of California 1903, Sec. 2049.

Some of the earlier and later decisions of our Federal Courts aid somewhat in the determination of the construction to be placed upon these terms.

In the M. Vandercook, 24 Fed. 472, 475, the Court said:

> "I am of the opinion that, under the circumstances of the case, the libelant must be treated as a master, and that his claim for wages is not an admiralty lien."

In the case of The Marie, 49 Fed. 287, in determining the right of wages due from a vessel owned by a foreign country, the Court said:

> "By the treaty the consuls of either nation have a right to sit as judges and arbitrators in such differences as may arise between the captains and crews of vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities.
>
> "The words 'crews of the vessels,' as here used, include all of the ship's company—**all the seamen** and officers, **except the captain.**"

The Court, in Gonzales v. U. S. Shipping Board etc., 3 Fed. (2d) 168, construing and defining the terms "seamen" and "vessel," said:

> "The same section of the statutes above referred to, Section 8392 of the Compiled Statutes, that defines a 'seaman' defines the term 'vessel.' As we have seen, a 'seaman' is one employed on a 'vessel.' And this section says: 'A "vessel" shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river.' The Standard Dictionary defines a 'seaman' as: **'One not an officer who takes part in the practical navigation of a vessel—a sailor.'** It defines a 'sailor' as 'one whose occupation is to aid in navigating a vessel, especially one of the crew.'"

In The Atlantic, 53 Fed. 607, 608, the Court said:

> "It is a puzzling question whether libelant stood in the place of the master or not. * * * On the other

> hand, he had none of the responsibility or powers of a master, never had any independent authority, did not get continuous wages, but was paid only when his engine was at work. Upon the whole, I am of the opinion that he cannot be treated as a master of a vessel. He was master in no maritime sense."

There are instances where, due to the context of the law and the purpose to be accomplished, the Courts have construed the term "seaman" to include "master." Some of such cases may be generally referred to as the right to become a citizen of the United States, the right to make nuncupative or unwritten wills, and in certain criminal cases, but in none of these cases is the question of negligence charged to an inferior officer or sailor who is under the direct orders and command of the master, nor do any of these cases involve the control of the vessel which is under the direct charge of the master. Such cases do not undertake to enlarge the term "seamen" to include "masters" for the purpose of recovering for the wrongful death, especially where there had been no remedy provided for such wrongful death.

It is also recognized that our courts, in construing Section 33 of the Merchant Marine Act, have regarded the term "seamen" as flexible enough to include employes engaged on modern vessels, who were not formerly regarded, technically, as seamen, such as a stevedore, carpenter, clerk, engineer, fireman, musician, pilot, wireless operator, and, in some instances, other officers of the vessel, with the exception of the chief executive officer or master, the same as the courts have construed the Federal

Employers' Liability Act to include employes engaged by modern railroads in the various positions for carrying on interstate commerce. This has been done to carry out the purposes of the act so as to make the act applicable to all employes, whether engaged in interstate commerce by railroads or engaged in the transportation of freight and passengers by vessels on the high seas.

In so construing these acts, the courts have not been unmindful of the rule that statutes in derogation of the common law are to be strictly construed, while the remedial features thereof are to be liberally construed.

While, apparently, our courts have not yet been called upon to construe the Federal Employers' Liability Act, so that the term "employe" would include the chief executive officer, the president of a railroad, whose powers and duties extended to the employment of all employes, the supervision and control of all employes, the purchase, furnishing and maintenance of all equipment, and the operation thereof, it is inconceivable that the Court would construe said act so that the representative might recover under the wrongful death provision of that act for the death of said executive due to said executive's failure to perform his duties.

In construing that act it would follow the language of Mr. Justice Hughes in the case of Robinson v. Balt. and O. R. Co., 237 U. S. 89, 59 L. Ed. 849, as follows:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in

their natural sense and intended to describe the conventional relation of employer and employe."

If the Court would be reluctant to extend the meaning of the term "employe" as used in the Federal Employers' Liability Act so as to make it include the president or chief executive officer of the railroad, then most assuredly the Court would not extend the meaning of the term "seaman" to include the master of a vessel on the high seas, whose authority as master over the vessel, the equipment, the navigation thereof, and the members of his crew, is absolute, supreme and exclusive, and when it is also taken into consideration that it is the duty of both officers and seamen to obey the master of a vessel, for an action of damages against the owner, which damages resulted from the master's failure to perform his duty or exercise the absolute, supreme and exclusive authority granted him.

While not exactly in point, still there is some analogy between the construction of the Workmen's Compensation Acts and the construction of this act which may assist in determining this question.

In the case of Browne v. S. W. Browne Company, 221 N. Y. 28, 116 N. E. 364, wherein the president and principal executive officer of the corporation which employed workmen in a hazardous occupation, undertook to bring himself within the terms and provisions of the Workmen's Compensation Act, the Court held that the president or principal executive officer of the corporation was not considered as an employe within the meaning of the New York Workmen's Compensation Act.

This was later followed in Skouitchi v. Chic Cloak & Suit Company, 230 N. Y. 296, 130 N. E. 299, 15 A. L. R. 1825. In that case the Court, referring to Browne v. S. W. Browne Company, 221 N. Y. 28, said:

> "We simply held that the higher executive officers of a corporation are not, as such, its employes in the ordinary use of the wording."

Since the instant case is brought under the wrongful death feature of Section 33 of the Merchant Marine Act, the same should be strictly construed as to the persons entitled to its benefits without destroying the real purpose and object of the act as affecting employes or seamen. To this extent the same general rules of construction apply to this phase of the Federal Employers' Liability Act and Section 33 of the Merchant Marine Act, as in the case of the construction of the Wrongful Death Acts of the various states.

The Washington Supreme Court (en banc), in the case of Whittelsey et al. v. City of Seattle, 163 Pac. 193, L. R. A. 1917 D 1084, said:

> "Some courts have held the Wrongful Death Act, which, in some form, is common to all the states (3 Shearm. & Redf. Neg., Appx., p. 2015 et seq.), to be in derogation of the common law, and therefore to be construed strictly. Others have held the act to be remedial, and have construed it liberally. But, having in mind our own decisions, we agree with Judge Cooley, who suggests the correct rule: **'That such**

> **statutes should receive a strict construction in determining the persons or classes of persons who are entitled to their benefit,** and a liberal construction in applying the statute in their favor' (1 Cooley, Torts [3d Ed.] 553),"

and then, in the same case, deciding the question involved, said:

> "This Court, adhering to the doctrine of the Noble case and those following it, held squarely that the right of either husband or wife to sue for the death of the other depended entirely upon legislation, and that a statute giving a right of action that did not theretofore exist would not be extended by construction beyond the class or classes specifically mentioned therein."

The Missouri courts have maintained the same position. In the case of Bates v. Sylvester, 205 Mo. 493, 506, the Court, in reaching its conclusion, cited and approved the following:

> "that statutes in derogation of the common law are to be strictly construed, and one who seeks to maintain an action which was within the prohibition of the common law must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by the statute must present a case clearly within the statute which creates the right. * * *"

The St. Louis Court of Appeals, in Troll v. Gas Light Company, 182 Mo. App. 600, l. c. 604, said:

> "The statute is in derogation of the common law, and must be strictly construed; and one seeking to maintain an action thereunder must both allege and prove such facts as will bring him strictly within its provisions."

In the same connection the following citations assist in determining the attitude of our courts with reference to the construction of statutes of a similar character:

In a case construing a Texas statute providing for service upon the chairman of the State Highway Commission to secure jurisdiction over a nonresident motorist charged with negligence while driving on the highways in Texas, the District Court, in Morrow v. Asher, 55 F. (2d) 365, 367, held:

> "But, when a lawmaking body passes a statute which, because of necessity, subjects a person to a liability to which he was not therefore subject, the statute should be strictly construed. This was recognized by the courts of Texas in that line of cases which grew out of legislation that overturned the common-law rule that no right of action existed to recover damages for injuries resulting in the death of the injured * * *. The act creating such liability did not mention the acts of agents of natural persons, and the principal could not be held under the statute."

In Braeuel v. Ruether, 270 Mo. 603, 193 S. W. 283, 285, L. R. A. 1918 A 444, a will contest, the question arose as to the proper party, under the statute, having the right to bring such action. The Court held:

"The right of action to contest a will being purely statutory, it is therefore in derogation of the common law, and hence subject to the rule that its provisions must be strictly construed. * * *

"If, however, another well-established rule of statutory construction be invoked, viz., that remedial statutes are to be liberally construed * * *, and it is conceded that the statute in regard to the contest of wills is within this class, then upon a reference to its express terms we find 'only persons interested in the probate of wills' can be made parties to contest of same, and, bearing in mind the character of this interest, as frequently defined by this Court, the conclusion follows that, although the statute may be remedial in its nature, and hence subject to liberal construction, such construction cannot extend beyond its plain terms."

State ex rel. American Asphalt Roof Corporation v. Trimble et al. (Mo. Supreme Court), 44 S. W. (2d) 1103, 1105, certiorari to the Kansas City Court of Appeals, decided by the Supreme Court of Missouri, en banc. The decision is based upon the construction of a statute relating to an action for damages for the wrongful taking and conversion of personal property. The Court held:

"The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used * * *. The courts cannot enlarge and change the scope of statutes. * * * A court has no authority to write into a statute a provision not covered by its language. * * * Although the statute may be reme-

> dial in its nature and hence subject to liberal construction, such construction cannot extend beyond its plain terms."

The case of Wilhelm v. Hersh (St. Louis Court of Appeals), 50 S. W. (2d) 735, was for damages for personal injuries sustained in an automobile collision and involved the construction of a statute. The Court held that:

> "It is elementary that, if a statute is of limited application, or creates a limited liability conditioned upon the existence of certain facts, then such limitations and conditions must be met by him who seeks to rely upon it. In other words, a duty created by statute is also to be measured by the statute, and may not be extended beyond the terms and purview of the act."

In Lepard v. Michigan C. R. Co., 166 Mich. 373, 130 N. W. 668, 40 L. R. A. (n. s.) 1105, the Court held:

> "It is a well-established principle that the violation of a statutory duty is the foundation of such persons only as belong to the class intended by the Legislature to be protected by such statute."

Chase v. Erhardt (Distr. Court), 198 Fed. 305, 310, holds that:

> "Laws are construed strictly to assert a right to avoid a penalty; they are construed liberally to give a remedy or carry into effect an object declared in law."

It is reasonable to conclude, therefore, that, irrespective of the statutory definitions, the courts would construe the term "seamen," as used in Section 33 of the Merchant Marine Act, as not including the term "master."

C. **Construction of the terms used in Section 33 of the Merchant Marine Act in relation to the circumstances attending the passage of the act and the object to be secured thereby.**

While the respondent contends that there is no such ambiguity or uncertainty as to the meaning of the terms used in Section 33 of the Merchant Marine Act to justify the Court in resorting to extraneous matters as an aid in arriving at a correct interpretation, still, if the Court will be aided thereby, the respondent joins issue with the petitioner under that rule of construction.

It is common knowledge, of which the Court may take judicial notice, that at the time Congress had under consideration the framing of the Merchant Marine Act and at the time of its enactment there was almost a uniform desire to create an American Merchant Marine for the purpose of transporting American-made products over the high seas to foreign ports and so as to provide American hulls to be used by the United States Navy in times of armed conflicts with foreign countries; that at that time there was considerable controversy that the American laborer or the American wage-earner would not give up his employment in American industries for the wages and

compensation paid to seamen in competition with seamen employed on foreign-owned merchant vessels, and, also, that it was incumbent upon Congress to enact proper and adequate merchant marine laws for the proper protection of ordinary seamen so as to induce Americans to seek employment on American vessels as seamen. The object and the purpose of Congress was to meet this urgent demand, and it enacted the Merchant Marine Act and also the Jones Amendment thereto, Section 33 of the Merchant Marine Act, so as to comply with this demand in order to liberalize the old maritime laws in so far as seamen were concerned and give to American seamen certain rights and greater protection than heretofore afforded them.

As a result of the foregoing the Senate of the United States in 1919-1920 conducted extensive public hearings before its Committee on Commerce for the purpose of investigating the general subject of American Merchant Marine. The proceedings before this committee are contained in part II, volume 143, consisting of 2,089 pages, and covers the entire subject matter of Merchant Marine.

The record shows that there appeared before that committee members of the American Manufacturers' Export association, ship builders, exporters, brokers, agents for steamship lines, officers and members of the National Association of Masters, Mates and Pilots, and officers and members of the International Seamen's Union of America and other individuals and organizations.

It is very apparent upon reading all of these proceedings that on all occasions there was a clear distinction drawn between the master and officers of a vessel and the members of the crew or seamen.

By way of illustration, we quote extracts from the hearings as follows:

Captain Abernathy, at page 674, testified before said committee as follows:

> "The Chairman: Will you state right there, as a master, what the ordinary work is of seamen on steamers?
>
> Captain Abernathy: Simply to keep the vessel up, keep the ship clean, keep the cargo gear in order—that is all. On the Atlantic Coast the sailors do not work freight; have nothing to do with freight; simply to keep the ship in order."

At page 675 he testified:

> "All they do is to keep the ship up is to paint, keep the vessel in order and to overhaul the cargo gear; that is all we have; and the boat gear; keep the boats clear so that everything is in good shape, under the direction of the officers.
>
> The Chairman: How many able seamen are there on an 8,800-ton boat ordinarily?
>
> Captain Abernathy: Ten able seamen.
>
> The Chairman: And how many other seamen?
>
> Captain Abernathy: I believe they have four. I'm not thoroughly familiar with these ships under the merchant conditions. The vessel I was in and the ship I command now has six able seamen and two

ordinary seamen, boatswain and carpenter. That constitutes the deck crew outside of the officers."

At page 676:

"The Chairman: The men down in the fire room, engine room, etc., are not seamen?

Captain Abernathy: No, sir.

The Chairman: They are not classed as seamen?

Captain Abernathy: They are seamen under the law, but they are different from the deck crew. We call the deck crew seamen. **Within the meaning of the law everyone going to sea outside of the master is a seaman.**

The Chairman: That is what I want to get, under the meaning of the law how many are there on your cargo ship?"

We now come to the testimony of Andrew Furuseth, president of the International Seamen's Union of America (as distinguished from the Association of Masters, Mates and Pilots). By reading this testimony it will be seen that all of his testimony refers to seamen as distinguished from masters:

At page 1628 he testified:

"To learn to be a seaman takes three years at least, and that makes a poor man. To learn to be an officer takes a much longer time than that. To learn navigation takes the average schoolboy with the average school education, six weeks."

At page 1633 Senator Edge stated:

> "* * * because, as I understand it (the British system), in a general way they have not any regulation that is anywheres near as helpful to the seamen as the La Follette Act is supposed to be. In other words, they do not require a certain number of able seamen, and many other things."

Similar extracts of this witness' testimony will be found on pages 1638, 1639, 1641, 1643, 1644 and 1645, but we will not lengthen this brief by quoting all of these extracts.

The witness, Mr. Furuseth, then, at page 1649, introduced a lengthy statement of what the duties are of an able seaman, from which the following are extracts:

> "The ratings of sailors, men in the deck department, are: Boy, ordinary seaman, able seaman (quartermaster or boatswain, etc., are able seamen assigned to special work). The able seaman is the unit of skill and efficiency in the deck department. The boy and ordinary seaman is learning to be an able seaman and from among the able seamen, who have studied navigation, comes the officers and future masters of vessels.
>
> "* * * And please keep well in mind that if you do not know the able seaman's work, the master may, under the law, and under ancient usage, reduce you to a rating and pay you according to your demerit.
>
> "Every steamer's crew is divided into three separate sections, known as the deck department, the engine department and the steward's department.
>
> "The deck department (sometimes called the captain's department) has to do with the general naviga-

tion of the ship. Its officers are in general command, the highest deck officer, i. e., the master, being in supreme command of the entire ship, every department being subject to his orders; the first mate taking command in the absence of the master, and the second mate in the absence of his two superiors. The crew of the deck department, in which the able seaman is the unit, consists of the officers, quartermasters—where special men for steering are designated—boatswains, carpenters, a varying number of sailors, officially designated either as the 'able seamen' or the 'sailors,' and boys or men who are or who are supposed to be learning seamanship. A deck crew inefficient in skill or insufficient in number endangers the vessel, her passengers and cargo."

We now quote from the same witness' testimony on page 1656, after the introduction of the foregoing document:

"That covers the ordinary duties of an ordinary seaman's life. It does not cover the extraordinary things. There is not a thing there that a captain of a vessel, or an officer of a vessel, standing on his own feet, without the collar around his neck, will tell you is not a seaman's work, and the work that takes place almost any trip that a vessel goes on. And if he is not as good as that he would rather not have him on board of his vessel, and that is what he will tell you in secret, on the quiet.

"And now they say that we cannot get any men to go to sea, and we seamen, we said: 'You can, and no trouble about it at all.' All you have got to do is to change the conditions and give him a chance and he will come. Now, prior to the passage of the La Fol-

lette Seamen's Act, it was the unanimous consensus of opinion that on the Pacific Coast there were less than 4 per cent of native Americans sailing before the mast; I mean, in the deck department. There was less than 10 per cent on the Atlantic Coast. Now, on the 15th of July, 1917, we had 28.8 per cent of native Americans in the deck department of the Merchant Marine of the United States."

Then, at page 1697, he testified:

"Now, I want to speak about the duties of an officer. As he was learning to use, repair and replace the vessel's gear, he is now learning what a vessel can be made to do under sail, steam or other mechanical power under different conditions as to weather and sea. The master is there to teach him, and he is given opportunity to develop his own judgment by the experience through which he is now passing.

"From among the fourth mates the third mates are selected after either a customary or a statutory period served in the lower capacity. The wise, if not always the customary method, is to select for advancement—from a lower to a higher rating or grade—those who give evidence of the greatest capacity. As experience increases the certificates are raised until the grade of first mate or chief officer is reached. From these (after proper examination for a master's certificate) the employer—the shipowner—selects the man to whom he will entrust his vessel. He is now expected to know all that a vessel can be expected to do under the skillful use of such motive power as the vessel has. But, aside from these accomplishments, he must know the master's duty in port and at sea, under the laws

of his own country and the laws of nations. He must know something of medicine, to give at least first aid to the injured or sick. He must, in order to be a successful master, know how to pick out efficient officers and men, how to make the best use of men and materials in keeping the vessel in order and away from the repair yards and repair ships. Upon this will depend the quickness of the turnaround and the ability of the vessel to pay dividends."

In his testimony he referred to a number of other decisions of the Federal and U. S. Supreme Court, besides the Chelentis case.

The part of his testimony then follows, to which appellant, in her brief, refers, as follows (p. 1712):

"The Chairman: What is the amendment you suggest to section 20?

Mr. Furuseth: That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injuries to railroad employes shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employes shall be applicable, that is, the amendment.

Senator Fletcher: In other words, under the common law, **if a sailor** should step through an open hatch that had been left carelessly open, he would have no remedy?

Mr. Furuseth: He would have no remedy.

Senator Fletcher: And now you want to change that so he could have a remedy, provided his own negligence did not bring about the injury?

Mr. Furuseth: That is it exactly."

Thus we see that this amendment was presented by Mr. Furuseth, president of the International Seamen's Union, for the benefit and protection of the seamen as he described them in his testimony and documentary evidence, and not for the masters of vessels, and it cannot be presumed that Congress had any other intention.

Since petitioner in her brief singles out the case of Chelentis v. Luckenbach Steamship Company, 247 U. S. 372, in connection with Mr. Furuseth's testimony before said Committee, and argues that the Chelentis case was the basis of Section 33 of the Merchant Marine Act, we should briefly review that case.

The Chelentis case was not an action by the captain or master nor did it involve the right of a master to recover for damages due to personal injuries. The action was by a fireman instituted as a common-law action for personal injury damages based upon an alleged improvident order of his superior officer, as distinguished from an admiralty action for cure, maintenance and loss of wages. The Court denied the relief because "under the

circumstances here presented, without regard to the Court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

Granting that the Senate Committee's attention was directed to this case specifically, and assuming that the Committee had this case in mind in the preparation of the so-called Jones Amendment, Section 33 of the Merchant Marine Act, the reference thereto could only be for the purpose of giving common-law relief to the employes of a vessel such as engineers, firemen and to seamen, and had no bearing whatsoever on the question of distinguishing between the master and the employes or seamen engaged or employed on the vessel.

Even though the Court considers these extrinsic matters, the Court cannot refrain from construing the terms of this Act in accordance with the statutory definitions above referred to, and hold that it was not the intention of Congress to include the term "master" within the term "seamen", and that the real purpose of section 33 was to give remedial benefits to the employes of the vessel who are termed "seamen" and that it was not the intention of Congress to extend this relief to the master, who maintains the arbitrary authority as a vice-principal, over the members of the crew and the vessel itself.

D. **Construction of Section 33 of the Merchant Marine Act under the rule of interpreting same in the common-sense use of the terms.**

In the common use of the terms "master" and "seamen" as used in everyday life by the average individual and by the Press of the country, there is always a marked distinction between the term "master" and the term "seamen," or even the term "members of the crew." The common acceptation of these terms clearly indicates that distinction. The various standard dictionaries define the term "seaman" as follows:

Century Dictionary:

> "A man whose occupation it is to co-operate in the navigation of a ship at sea; a mariner; a sailor; applied to both officers and common sailors, but technically restricted to men below the rank of officers."

Black's Law Dictionary:

> "Sailors; mariners; persons whose business is navigating ships, commonly exclusive of the officers of the ship."

In Marie, 49 Fed. 287, the Court said:

> "The words 'crews of the vessels' as here used, include all of the ship's company—all the seamen and officers, except the captain."

In Gonzales v. U. S. Shipping Board etc., 3 Fed. (2d) 168, the Court, construing and defining the terms "seamen" and "vessel," said:

> "As we have seen, a 'seaman' is one employed on a 'vessel.' * * * The Standard Dictionary defines a 'seaman' as: 'One not an officer who takes part in the practical navigation of a vessel—a sailor.' "

In a technical sense, as used in navigation, and especially under all of the rules and regulations promulgated by the Department of Commerce, there is always a clear distinction made in the use of the term "master" as distinguished from the use of the term "seaman."

The conclusion, therefore, is that, even though we undertake to interpret this act from the common or technical use of the terms, we find that Congress did not intend to include a master of a vessel in its term "seamen" as used in Section 33 of the Merchant Marine Act.

E. **Although a pilot is temporarily in charge of a vessel, the master is not absolved, and the vessel is still under the command of the master.**

In the case of The Oregon, 158 U. S. 186, 39 L. Ed. 943, a collision case occurring in the Columbia River at night, while the captain or master was temporarily absent from his post of duty, and where "the deck watch was composed of the **river pilot in command**, who was on the bridge just above the pilot-house, a man at the wheel and a lookout upon the forecastle head. **No officer** and no other man connected with the vessel **was on deck** from the time the watch was changed at 12 o'clock until the collision."

The Court held:

> "Nor are we satisfied with the conduct of the master in leaving the pilot in sole charge of the vessel. While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, **the master is not wholly absolved from his duties while the pilot is on board, and may advise with him**, and even displace him in case he is intoxicated or manifestly incompetent. **He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties.**"

In Betavier, 1 Spinks, Eccl. 378, 383, it was said by Dr. Lushington:

> "That, **while the master sees that his officers and crew duly attend to the pilot's orders, he, himself, is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist,** not only to urge upon the pilot to use every precaution, but to insist upon such being taken (Marsden, Collisions, 255)."

In the case of The John A. Morgan-Grinnell v. The John A. Morgan, 28 Fed. 895, 896, the Court said and held:

> "Daniel Grinnell was to be and was the pilot. Philip S. Grinnell now styles himself the master of the seine, who had the oversight of the fishing department. This vessel was what is called a 'single-gang boat' in which

the captain is, as a rule, the master of the seine. 'Double-gang boats' have two masters of seines, one of whom is captain.

"There is not sufficient evidence to enable me to find definitely the reason why the libelant chose to call Daniel Grinnell the captain, **but I believe it was because**, as the result of George W. Miles & Company's failure, **said P. S. Grinnell thought that a captain has no maritime lien upon the vessel** for his wages. **The libelant was actually the captain of The John A. Morgan, and continued so to be till the end of the voyage.**

"The claim of the libelant for a lien for seamen's wages is founded upon a pretense. He was not an ordinary seaman, but was the captain, and should not be permitted to gain a maritime lien through a subterfuge."

In White v. McDonough, 29 Fed. Cas. No. 17,552, a libel was filed by a musician against the master for assault. The vessel was being navigated in the Colorado River.

In that case it was argued that "the master, being merely the agent of the owners, his omission to perform a duty which the owners may have owed to a passenger, under their contract as common carriers, does not give the passenger any right of action against the master."

But the Court held:

"Both the owner and the master are regarded as common carriers. For his own negligence and misfeasances, the master is liable, and there appears to be no distinction in principle between this case and

> many which are found in the books against the masters, **such as for injuries to property arising from negligence or unskillfulness, permitting one of his subordinate officers to maltreat a seaman, for indecent behavior to a female passenger and the like.''**

Again, in the case of Dorrell v. Schwerman, 111 Fed. 209, the Court said:

> "As the libelant was in the relation of mariner, he was during such service subject to the authority vested in the master of the steamer. The rule as to this authority is thus stated by Kent (**3 Kent Com. 131**), and frequently approved by the courts: 'Being responsible over others for his conduct as master, the law, as well on that account as from the necessity of the case, had intrusted him with great authority over the mariners on board. **Such authority is required for the safe navigation of the ship and the preservation of good order and discipline.''**

It will be noted from all the decisions that the courts make a clear distinction in the use of the terms "master" and "seamen" or "mariners" and that the master is not treated as a seaman, but the master is treated as the commanding spirit (the same as the owner) of a vessel, even to the extent that the master becomes liable for injury or damage due to the carelessness or negligence of the crew and that he is vested with supreme authority over the vessel and her crew, from which authority and duty he is not absolved by being absent from his post of duty while a pilot is in charge.

Considering now the only allegation of negligence in the petition, in connection with the foregoing construction, there can be but one conclusion. The sole charge of negligence is that while towing down the Ohio River in low water some of the barges grounded; that the steamer was "used and **navigated**" to unground the barges and while so "used and navigated" the steamer lodged between the shore and the barges with such force as to throw the deceased into the river. If this is anything it is an allegation of careless and negligent **navigation**, a matter which, as a matter of law, is purely and strictly under the power, duty and control of the captain or master and for which he alone is liable and responsible. The only other cause that could be assigned would be that of the ordinary dangers of navigation for which, it would be conceded, there could be no liability against this defendant. Most assuredly it will not be successfully contended that Congress intended to make the term "seaman" so inclusive as to cover the "master" in such circumstances as here disclosed, especially where the duties and obligations of the navigation were solely and purely those of the master and no one else.

Nor can the petitioner herein escape the question, by attempting to bring herself within the purview of Section 33, by claiming that her deceased husband, at the particular moment, although the master of the vessel, was not actually at his post of duty, as the master, and, therefore, should be classified as a seaman under the terms of this act.

II.

There is another ground upon which this demurrer should be sustained, namely, that petitioner must, but does not, allege that the deceased, **at the time of the injury or accident,** was engaged in interstate commerce.

Obviously petitioner is overcautious to create the impression that the deceased was not the master at the particular time of the accident so as to try to leave the inference, at least, that momentarily he transferred his own status from that of master to that of seaman, and in so doing fails to allege that other necessary element above stated, without which allegation she cannot recover, especially since the Federal Employers' Liability Act, made applicable to seamen by reference in Section 33 of the Merchant Marine Act, is the basis of her right of recovery.

In her petition she alleges:

> "That while said 'Iowa' was being navigated, used and controlled by the agents, servants and employes of the said defendant, **other than said John M. Warner,** to unground the said barges so that the said voyage might continue, the said agents, servants and employes of the defendant, **other than the said John M. Warner, and independently of him and while said John M. Warner** was not cognizant of exactly what was being done on all parts of the said 'Iowa,' so negligently, carelessly, recklessly and unskillfully handled, used, controlled, operated and navigated the said 'Iowa' that they caused the said 'Iowa' to collide forcibly and violently with the said barges and the bank of the Ohio

River; that at this time the said John M. Warner was attempting to save his own life and the lives of those on board the said 'Iowa' and was attempting to save the property of the defendant from further injury; that as a direct and proximate result of said collision and the violent jar resulting therefrom and caused thereby, caused as aforesaid by the negligence of the defendant, his agents, servants and employes **other than the said John M. Warner**, the said John M. Warner was thrown from the said 'Iowa' into the waters of the said river and was thus caused to drown."

If said Warner was not then the master, what were his duties? What was he doing in the course of his employment at the particular time?

The petition absolutely fails to bring the deceased within the term. There is nothing, affirmative, in the petition to show in what capacity, if any, the deceased was employed, at the time of the accident, nor does it show, in any manner, what duties, if any, the deceased had to perform or was in the act of performing at that time. On the contrary, the petition negatives the idea that the deceased was engaged in any interstate commerce at the time. Purely negative. Nothing to show the character of employment, if any. Nothing to show his duties, if any. Nothing to show that he was a seaman.

The amendment provides "that any seaman who shall suffer personal injuries **in the course of his employment.**" Nothing is here stated or alleged that he was injured or killed while in the course of his employment. Nothing is

stated as to the nature of his employment, nor is anything alleged as to the duties he was then performing. On the contrary, by negative allegations and by natural inference, the deceased, at the time, was doing nothing and was not engaged in the performance of any duties, much less performing duties as a seaman in the course of his employment.

In Thornhill, Admx., v. Davis, Director General (S. C.), 113 S. E. 370, 24 A. L. R. 617, 625, the Court held:

> "**The contention that both the carrier and the employe must be engaged at the time of the injury in interstate commerce** is supported by the decisions construing the following language of the act: 'Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.' "

The Supreme Court of Missouri in a case very similar to the one under consideration, in Elliott v. Payne, 239 S. W. 851, 23 A. L. R. 706, held:

> "There is not a word of direct testimony as to why or for what purpose the deceased left his moving engine. The cases (both federal and state) all hold that the burden is upon the plaintiff to show that the servant was about the business of the master at the time of the injury. **Without** this pleading and proof there can be no recovery."

In that same case the Court approvingly quoted from Barry v. Hannibal & St. J. Ry. Co., 98 Mo. 62, 70, as follows:

> "As a general rule it may be conceded that a servant has no claim upon the master for damages for an injury which the servant receives by voluntarily assuming to do something which the master did not employ him to do."

Thus it will be seen that even though the master may be classified under the term "seamen" as used in Section 33 of the Merchant Marine Act, the petitioner has failed herein to state a cause of action, in that she fails to allege that the deceased, at the time of the injury or death, was engaged in interstate commerce, as is required under the Federal Employers' Liability Act.

Petitioner's Citations.

Petitioner cites International Stevedoring Co. v. Haverty, 272 U. S. 50, 52, 71 L. Ed. 157, 160, for the purpose of showing that the Court considered the term "seamen" flexible enough to include stevedores, and, therefore, we should extend the flexibility so as to extend it to master. Cases of similar import are cited by petitioner for the same purpose. However, an examination discloses the Court's reasoning. In the International Stevedoring case the Court gave its reason for so extending the term by showing that the stevedore in that case was, at the time, performing duties formerly performed by the ship's crew or seamen, and in that connection said:

"It is true that for the most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. **The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew** (Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. Ed. 1208) * * *. We cannot believe that Congress willingly would have allowed the **protection to men engaged upon the same maritime duties** to vary with the accident of their **being employed by a stevedore rather than by the ship.** The policy of the statute is **directed to the safety of the men** and to treating compensation for injuries **to them** as properly part of the cost of the business."

The sole question in Burns Bros., 29 Fed. (2d) 855, was whether a master of a tug, in Admiralty, could maintain an action to recover costs for injuries without prepayment of or bond for costs as provided under Section 837 of the Judicial Code and Judiciary and was not decided upon his right to recover damages for personal injuries.

Then petitioner cites and quotes from In re Scott, 250 Fed. 647, which is based upon a declaration of a foreigner, a master, to become a citizen of the United States under the Naturalization Act providing for seamen, being foreigners, to become citizens. Clearly the construction of such an act would not be like that of the one under consideration. As previously pointed out, there are instances where the term "seaman" is broad enough to cover "masters," viz., in matters of naturalization, protection against

criminal and felonious assault, matters relative to certain military duties, and matters going to the validity of nuncupative or unwritten wills. The Court, in that very case, recognized the distinction by the following language:

> **"It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context."**

In the matter here under consideration we must not be unmindful of the fact that Congress is giving to a class, "seamen," employes, members of the crew, "men," a right or remedy not enjoyed at common law, and, furthermore, Congress specifically defines the terms therein used.

The petitioner then continues upon the same erroneous theory heretofore maintained, namely, that it is here attempted to **exclude** something as distinguished from the real situation as to whether Congress, by first specifically defining "master" and then "seamen," intended to **include** master in its classification of seamen. Petitioner entirely overlooks the real purpose of the act as that to protect the men, the employes, and not the executive officers, the commander, the master or the vice-principal. This is not a case of "exceptions" made in the statute as contended. The authorities cited by petitioner are based upon that theory. For this purpose, without burdening this brief, it will suffice to call attention to one of these cases cited, namely, Piedmont & N. R. Co. v. U. S., 30 Fed. (2d) 421, 431, which was an action to set aside an order of the Inter-

state Commerce Commission denying application for public convenience and necessity, and involved the construction of the Transportation Act of 1920, particularly section 22, in which "The authority of the Commission conferred * * * **shall not** extend to the construction * * * of street, suburban," etc. That was a case of express limitation more than that of an exception and involved a general policy as to our transportation systems. That part of that decision relied upon recognizes this in this language (l. c. 431):

> "On the contrary, it is an elementary rule that **exceptions from the general policy embodied in a** statute are to be strictly construed and are not to be so interpreted as to destroy its remedial purpose."

In considering the cases cited by petitioner to substantiate the position that our courts have construed the term "seamen" to include the "master" we must keep in mind the nature of this cause of action, which is based upon allegations of negligence and the theory of recovery for personal injuries or death resulting through the carelessness and negligence of respondent's servants who are directly under and subject to the orders of the master of the vessel.

The Balsa, 10 Fed. (2d) 408, was not one growing out of common-law negligence, nor did it involve the construction of statutory law, but was one in admiralty, for recovery of the costs of cure and maintenance. The lower court

denied his claim for damages but allowed him for cure and maintenance, which latter claim was appealed and affirmed.

Before giving weight, as petitioner does, to the quotation from Nogueria v. N. Y. N. H. & H. R. Co., 32 Fed. (2d) 179, and 281 U. S. 128, 74 L. Ed. 754, we must determine what facts were before the Second Circuit and the Supreme Court and what was the question to be determined. Neither Court was called upon to determine whether the term "seamen" included "master," and neither so decided. That was an action by a freight handler and the question arose whether his remedy was under the "Jones Amendment" or under the Longshoremen's and Harbor Workers' Compensation Act. Nor is petitioner justified in inferring that the Supreme Court thereby inferred that the "master" had his remedy under the Jones Act. There is no dispute and there is no question but that this petitioner had a remedy for the death of her husband, if the facts justified same, but she has elected the wrong remedy here and cannot maintain this action under this statute. In the aforesaid case cited the Court of Appeals similarly held:

> "In the meantime **seamen** had been given by the Jones Act * * * the remedies accorded to railway **employes** under the Employers' Liability Act. * * * As a result the **seamen** were satisfied with their condition and, through their organized representatives,

made known to Congress that they wished to remain outside the Longshoremen's and Harbor Workers' Compensation Act."

It is true that in the case of In re Eastern Transport, 37 Fed. (2d) 355, the Court recognized the right of the representative of the deceased master of a barge to institute an action in damages for his death, based solely upon the **unseaworthiness** of the barge, but the Court's language distinguished that case from the one under consideration by holding that the deceased was, in fact, not a master (l. c. 363):

> **"The master of the barge was in effect not a captain or master, within the general acceptation of those terms, but was simply an attendant on the barge. A bargee has not the power and authority of a ship-master. * * * His position, if not identical with, is at least very similar to, that of an ordinary seaman."**

In the case of Clyde S. S. Co., 16 Fed. (2d) 930, the controversy grew out of an action by the widow, administratrix of the deceased, Beer, who was not the captain or master of the vessel, but was an officer. The accident grew out of the explosion of gunpowder, and the testimony showed "that **the master** instructed Beer to cover the powder with a tarpaulin and watch it."

It is not necessary in determining this case to say whether the term "seaman," as used in the act, includes

the other officers of a vessel, but suffice to say that the act does not define any other officer and no other officer stands in the same superior and commanding position as the captain or master, especially in matters of directing the navigation or course of the ship.

The case of Crosby Fisheries, Inc., 31 Fed. (2d) 1004, grows out of an accident resulting in the death of the mate of a boat. This is the opinion of the District Court and not the Circuit Court of Appeals.

The case of The Buena Ventura, 243 Fed. 797, was a case in admiralty by a wireless operator seeking to recover for maintenance, cure and wages.

Without reviewing each of the great number of cases cited by petitioner, we may state that those above referred to fairly disclose the trend of all that have been or can be cited. We again repeat that petitioner can get little, if any, comfort or satisfaction out of any of them for the purpose of sustaining her position herein.

IN CONCLUSION,

It may be stated that, irrespective of which rule of statutory construction is adopted to determine the extent of the meanings of the terms "master" and "seamen" as used by Congress in Section 33 of the Merchant Marine Act, the conclusion must be in accordance with the definitions adopted by Congress in section 713, and, therefore, this action of petitioner cannot be maintained under Section

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1934.

Claire A. Warner, Administratrix of the Estate of John M. Warner, Deceased, Petitioner,
vs.
Edward F. Goltra, doing business under the style and name of the Goltra Barge Line, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[November 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

The master of a tug-boat met his death on the waters of the Ohio River through the negligence of a pilot employed to navigate the tug. The personal representative brought suit against the owner under the Merchant Marine Act of 1920, § 33 (41 Stat. 1007, 46 U. S. C. §688) for the recovery of damages. The trial court sustained a demurrer to the complaint on the ground that a "master" is not a "seaman" within the meaning of the statute. The Supreme Court of Missouri affirmed the judgment for the owner. 334 Mo. —, 67 S. W. (2d) 47. The case is here on certiorari. 292 U. S. 617.

The statute is set forth at large in opinions of this Court. *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 383; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371. It gives to "any seaman" injured in the course of his employment, and in case of the death of such seaman to his personal representatives, a cause of action similar to that given by the statutes of the United States to railway employees. In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained. Early in the history of the act, the question came up whether it gave a remedy to stevedores. We decided that it did. "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen' ". *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52. None the less, verbal niceties were

bent to the overmastering purpose of the act to give protection to workers injured upon ships. "Words," we said, "are flexible." *International Stevedoring Co.* v. *Haverty, supra,* at p. 52. Later decisions of this Court have been conceived in a like spirit (*Jamison* v. *Encarnacion,* 281 U. S. 635; *Uravic* v. *F. Jarka Co.,* 282 U. S. 234; *Cortes* v. *Baltimore Insular Line, supra,* at p. 375), and other courts have followed suit.[1]

The problem for solution here stands out upon this background. There are contexts in which the word seaman is held to exclude the master or even any officer. See, e. g., R. S. § 4530, as amended by § 31 of the Merchant Marine Act of 1920 (46 U. S. C. § 597); also 46 U. S. C. §§ 564, 568, 570, 592, 594, 597, 658, reenacting R. S. §§ 4511, 4515, 4517, 4525, 4527, 4530, 4561, as from time to time amended. There are other contexts in which it takes them in. 28 U. S. C. § 837; also R. S. § 2174; *In re Scott,* 250 Fed. 647, 648; *The Balsa,* 10 F. (2d) 408; *The Burns Bros.,* No. 31, 29 F. (2d) 855. The respondent points to statutes that develop the antithesis between a seaman and those over him. See citations, *supra.* They do not carry us very far, any more than the contrast that exists for many purposes between a seaman and a stevedore. In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects "the operation and welfare of the ship when she is upon a voyage." *The Buena Ventura,* 243 Fed. 797, 799, where a wireless operator was brought within the term. In a narrow sense the term is limited to one who is an ordinary seaman and nothing more, a seaman as opposed to the master or an officer. One can find a like range of variation in the use of the word "crew." "It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers." *United*

[1] See Grimberg *v.* Admiral Oriental S. S. Line, 300 Fed. 619; The Sea Lark, 14 F. (2d) 201; Kuhlman *v.* W. & A. Fletcher Co., 20 F. (2d) 465; Rogosich *v.* Union Dry Dock & Repair Co., 67 F. (2d) 377; and cf. The Buena Ventura, 243 Fed. 797, 799: "The word 'seaman' undoubtedly once meant a person who could 'hand, reef and steer', a mariner in the true sense of the word. But as the necessities of ships increased, so the word 'seaman' enlarged its meaning."

States v. *Winn,* 3 Sumn. 209, 213, 214, Fed. Cas. No. 16,740 (Story, J.); cf. *The Buena Ventura, supra,* 799 (Hough, J.); *The Bound Brook,* 146 Fed. 160, 164; *United States* v. *Huff,* 13 Fed. 630. What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained. Congress knew that men employed upon a ship were without a remedy in damages for negligence beyond their cure and maintenance, unless the injury was a consequence of the unseaworthiness of the ship or a defect in her equipment. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 384; *Cortes* v. *Baltimore Insular Line, supra.* This restriction upon remedies was applicable to ordinary seamen, but applicable also to officers and even to the master. *The Brig George,* 1 Sumn. 151, Fed. Cas. No. 5,329 (Story, J.); *The Balsa, supra.* "It is said, that the allowance by the maritime law belongs to the seamen only, and cannot be claimed by the master of the ship. . . . No authority is cited for this position; and I am not aware that any exists." Story, J., in *The Brig George, supra,* at p. 155. Cf. the rule in Great Britain under the Merchant Shipping Act, 1906 (6 Edw. 7, No. 48, § 34). The old measure of recovery was the same for all aboard, the highest and the lowest. The new measure was not designed to narrow the protected class while broadening the damages. We stick too closely to the letter if we say that Congress had the will to give damages for wounds or death to the crew at large or their dependents and to leave the master and his dependents out. An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibres still clinging to the soil.

The purpose of the lawmakers, clear enough, we believe, upon the surface of the act, takes on an added clearness when the act is viewed in the setting of its history. Section 33 of the Merchant Marine Act of 1920 is derived from § 20 of the Act of 1915. 38 Stat. 1185. The parent section was aimed at the fellow-servant rule in its application to torts upon navigable waters. *Chelentis* v. *Luckenbach S. S. Co., supra.* It provided that "in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-

servants with those under their authority." Masters were thus recognized as within the genus seamen, though they were seamen having command. The decision of this Court in the *Chelentis* case gave warning that the change, if any, thus effected, did not avail to increase the damages beyond the cost of cure and maintenance. Thus warned, the lawmakers amended § 20 of the Act of 1915 by substituting § 33 of the Act of 1920. We cannot believe that in this process of amendment the word seamen lost the broad meaning that it had in the law to be amended, and was narrowed by the exclusion of a particular species of seamen, i. e., seamen having command. The change is too sudden to be accepted as intended unless unmistakably declared.

The scheme of legislation becomes symmetrical and consistent when the Merchant Marine Act of 1920 is read in the light of another act in *pari materia,* the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. C. § 901 *et seq.*) adopted in 1927. This act expressly excludes from its "coverage" a "master or member of a crew of any vessel." § 903. The exclusion was at the request of seamen who notified the committee in charge that they preferred the remedy for damages under the act of 1920 to the benefits that would be theirs under a system of workmen's compensation. See Hearings before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess., on S. 3170, at p. 17; Cong. Rec., 69th Cong., 2d Sess., vol. 68, part 5, p. 5908; *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 134, 136. The bill was accordingly amended in its progress through the House by declaring the exception. There can be little doubt that Congress did this in the belief that under the statutes then in force master and crew alike were already adequately protected in case of injury or death. The belief had a sound foundation in the act of 1920. Cf. *Nogueira* v. *N. Y., N. H. & H. R. Co., supra,* at p. 134.

In reaching the opposite conclusion, the Supreme Court of Missouri rested its opinion on § 713 of Title 46, c. 18 of the U. S. Code, which for the purpose of construction defines a master and a seaman as well as other terms.[2] With a few verbal changes § 713

[2] "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed

is a reenactment of § 65[3] of the Act of June 7, 1872 (17 Stat. 277), which was then known as § 4612 of the Revised Statutes. In the compilation of the Code some of the provisions for the protection of seamen contained in the act of 1872 were placed in Title 46, which relates to shipping, and particularly in Chapter 18 of that title, which relates to "Merchant Seamen." They had previously been reenacted, as parts of the Revised Statutes, along with § 65. The acts of 1915 and 1920 were placed in the same chapter and title, and were thus brought into contiguity with the sections carried over from the Act of 1872. Very clearly the change of location did not work a change of meaning. The rule of construction laid down in § 713 must be confined to those sections of the chapter which were contained in the Act of 1872, or in the equivalent provisions of the Revised Statutes, before the Code had rearranged them. The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so. As to that the command of Congress is too clear to be misread. 1-4 U. S. C. § 2a, 44 Stat. Part I, 1.[4] To this it must be added that § 713, even in its relation to the sections fairly within its range, is "directed to extension not to restriction." *Uravic* v. *Jarka Co.*,

to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

[3] "That to avoid doubt in the construction of this act, every person having the command of any ship belonging to any citizen of the United States shall, within the meaning and for the purposes of this act, be deemed and taken to be the 'master' of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a 'seaman' within the meaning and for the purposes of this act. . . ."

[4] "The matter set forth in the Code, . . . shall establish prima facie the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code, and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactment."

supra, at p. 239. It means that "for the purposes of the chapter 'seaman' shall include persons who otherwise might be deemed not to be seamen." It puts into the class some that might otherwise be excluded; it does not take any one out who would otherwise be there.

The case for the respondent reduces itself to this, that by express or implied antithesis the word seaman is used in many statutes to designate a class of mariners exclusive of the master. It is also true, however, that in these same statutes a seaman excludes a stevedore. A goodly number of the statutes where the antithesis is sharpest lay a duty upon the master to be performed for the seamen under him. In laws so framed, there is no room for construction. A goodly number in addition give a remedy to seamen for wages wrongfully withheld, or define terms of payment that agreement may not vary. In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a "ward of the admiralty," often ignorant and helpless, and so in need of protection against himself as well as others. The master, on the other hand, is able in most instances to drive a bargain for himself, and then when the bargain is made, to stand upon his rights. Discrimination may thus be rational in respect of remedies for wages. *The Bethulia*, 200 Fed. 876; *The Putnick*, 291 Fed. 902. It is neither rational nor just if extended to remedies for bodily wounds. At such times master and seaman are approximately equal. Congress did not mean that the master, any more than the seaman, should be left without a remedy if wounded in his body, or that his dependents were to be helpless if the wounds resulted in his death.

The judgment is reversed, and the cause remanded to the Supreme Court of Missouri for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.